115-29

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 279.

PHILADELPHIA BAR ASSOCIATION

E. S. WHEELER AND COMPANY, PLAINTIFFS IN ERROR,

vs.

THE NEW BRUNSWICK AND CANADA RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED SEPTEMBER 27, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Circuit Court of the United States for the District of Connecticut.

NEW BRUNSWICK & CANADA RAILROAD CO. *v.* E. S. WHEELER & CO.

To the honorable the judges of the circuit court of the United States for the second circuit and district of Connecticut:

The petition of E. S. Wheeler & Co., defendant in the above-entitled action, respectfully represents that said defendant is aggrieved by the final judgment rendered against this defendant in said action, and is informed that there is error therein to its prejudice, and he desires a writ of error be allowed therefrom to the Supreme Court of the United States.

Wherefore the defendant prays that a writ be allowed, returnable to the next term of the Supreme Court of the United States.

E. S. WHEELER & CO.,
By Att'y JNO. S. BEACH.

2 Supreme Court of the United States.

Circuit Court of the United States, District of Connecticut.

NEW BRUNSWICK AND CANADA RAILROAD COMPANY
vs.
E. S. WHEELER AND COMPANY.

Know all men by these presents, that we, E. S. Wheeler and Harmanus M. Welch, of the town and county of New Haven, State of Connecticut, are held and firmly bound unto the New Brunswick and Canada Railroad Company, a corporation duly chartered and organized by and according to the laws of the Province of New Brunswick and the Dominion of Canada, Kingdom of Great Britain, and located in said Province of New Brunswick, in the sum of thirty thousand dollars, to be paid unto the said New Brunswick and Canada Railroad Company, its successors or assigns.

To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

3 Sealed with our seals. Dated this thirteenth day of July, 1882.

Whereas the above-named E. S. Wheeler and Company, of which firm the said E. S. Wheeler is a partner, have presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Connecticut:

Now, therefore, the condition of this obligation is such, that if the said E. S. Wheeler & Company shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good this plea, then this obligation shall be void; otherwise to remain in full force and virtue.

E. S. WHEELER. [L. S.]
HARMANUS M. WELCH. [L. S.]

Sealed and delivered in presence of—
JNO. S. BEACH.

The foregoing bond is approved, July 13th, 1882.

N. SHIPMAN,
District Judge.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court for the district of Connecticut, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in said circuit court, before you, between the New Brunswick and Canada Railroad Company and E. S. Wheeler and Company, a manifest error hath happened, to the great damage of the said E. S. Wheeler and Company, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the
5 United States, together with this writ, so that you may have the same at Washington on the second Monday in October, 1882, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 13th day of July, in the year of our Lord one thousand eight hundred and eighty-two.

Allowed by—

N. SHIPMAN,
District Judge.

6 UNITED STATES OF AMERICA, *ss:*

To the New Brunswick and Canada Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Connecticut, wherein E. S. Wheeler and Company are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 13 day of July, in the year of our Lord one thousand eight hundred and eighty-two.

N. SHIPMAN,
District Judge.

7 Service of the within writ accepted.
Hartford, July 13, 1882.
THE NEW BRUNSWICK AND CANADA RAILROAD CO.,
By C. R. INGERSOLL, *Attorney.*

[Endorsed:] E. S. Wheeler & Co. *vs.* New Brunswick & Canada R. R. Co. Writ of error. Filed July 13, 1882. E. E. Marvin, clerk.

8 [SEAL.] The President of the United States of America to the marshal of the district of Connecticut, Greeting:

You are hereby commanded to attach to the value of thirty thousand dollars the goods or estate of Edwin S. Wheeler, of the city of New Haven, in said district, and William J. Isaacson, a citizen of the United States, but now residing in the city of Liverpool, England, both partners in business in the city of New Haven and elsewhere, by the firm name of E. S. Wheeler & Company, and them summon to appear before the circuit court of the United States for the second circuit to be held in and for said district of Connecticut, at the town of Hartford, in said district, on the third Tuesday of September, A. D. 1880, then and there to answer unto the New Brunswick & Canada Railroad Company, a corporation duly chartered and organized by and according to the laws of the Province of New Brunswick, and the Dominion of Canada, Kingdom of Great Britain, and located in said Province of New Brunswick, and having its principal office in the city of St. Stephen, in said Province of New Brunswick, and citizens of said Kingdom of Great
9 Britain, in a civil action, wherein the plaintiff complains and says:

First count.

1. On the 31st day of January, 1880, and long before and ever since, the plaintiff was and is a railroad corporation, owning and operating a railroad in said New Brunswick, and in connection with said business owned and had one thousand tons of old iron rails which were for sale.

2. On said 31st day of January, 1880, at said city of New Haven, the plaintiff and defendants mutually agreed, by written instruments duly executed by each of them duly delivered, that the plaintiff should sell to the defendants, and that the defendants should buy of the plaintiff one thousand tons of iron rails, and that the plaintiff should deliver the same to the defendants at the city of New York or of New Haven at the option of the defendants, on or before August 1, 1880, and that the defendants should pay the plaintiff therefor thirty dollars per ton, without or free from the duty to be paid to the United States Government, said $30 per ton to be paid in cash, upon receipt by the defendants of invoice of such rails with bill of lading and satisfactory insurance.

10 3. On the 14th day of June, 1880, the plaintiff still having said one thousand tons of old rails in its possession and ownership, tendered the same to the defendants and offered to de-

liver the same to the defendants at the city of New Haven or at the city of New York, as the defendants should elect.

4. On the 15th day of June, 1880, the defendants refused to receive said thousand tons of old rails, or any part thereof, at either the city of New Haven or of New York, and denied that they were bound to receive or pay for the same or any part thereof, and have ever and at all times since refused to receive said iron rails or any part thereof.

5. On said 15th day of June, 1880, the market price of such iron rails at the city of New Haven or the city of New York was the sum of 23 dollars per ton, duty paid, which duty was eight dollars per ton, so that the plaintiff's said iron rails at that time, at either said New Haven or New York, without or before the payment of said duty, were worth per ton only the sum of 15 dollars per ton, by which sum of 15 dollars per ton the plaintiff was damaged by the refusal of the defendants to receive and pay for said iron rails according to their said agreement.

The plaintiff claims damages on this count 20,000 dollars.

Second count.

The plaintiff further declares and says, in a plea of the case, that on and for a long time prior to January 31st, 1880, the plaintiff was a railroad corporation, owning and operating a railroad in
11 said Province of New Brunswick, and then owned and had in connection with its said business one thousand tons of old iron rails, which were for sale; that at the city of New Haven, in said district, on said 31st day of January, 1880, the defendants, in consideration that the plaintiff, then and there, in writing, promised and agreed with the defendants to sell said one thousand tons of said old iron rails to the defendants, to be delivered by the plaintiff to the defendants at the city of New Haven, or at the city of New York, at the option of the defendants, on or before August 1st, 1880, for the price of thirty dollars per ton, without or free from the duty to be paid to the United States, promised and agreed with the plaintiff, in writing, to buy from it said one thousand tons of iron rails, and to pay therefor to the plaintiff, in cash, upon receipt of the invoice of such rails and bill of lading and satisfactory insurance, the sum of thirty dollars per ton, without or free from the duty which would be paid to the United States; that on the 14th day of June, 1880, the plaintiff still had said one thousand tons of iron rails ready for delivery to the defendant-, and then tendered
12 the same to the defendants, and offered to deliver the same to the defendants at the city of New Haven, or at the city of New York, as the defendants should elect; but the defendants, their promise aforesaid not regarding, then and there refused to receive said one thousand tons of old iron rails, or any part thereof, at either the city of New Haven or the city of New York, and denied that they were bound to receive or pay for said thousand tons of old iron rails, or any part thereof, and have ever and at all times since refused to receive said thousand tons of old rails, or any part thereof;

that the market price of such old rails at the time of the defendants' refusal to receive the same, at either the city of New Haven or the city of New York, was the sum of 23 dollars per ton, duty paid, and that such duty then was eight dollars per ton; so that the market price of the plaintiff's said old rails at that time, either in New Haven or New York, without duty, was the sum of fifteen dollars per ton, and that by the refusal of the defendants to receive and pay for such old rails the plaintiff was damaged by the difference between the said contract price and the said market price, to
13 the amount of twenty thousand dollars.

Third count.

1. On the 31st day of January, 1880, and long before and ever since, the plaintiff was and is a railroad corporation, owning and operating a railroad in said New Brunswick, and in connection with said business owned and had six hundred other tons of old iron rails which were for sale.

2. On said 31st day of January, 1880, at said city of New Haven, the plaintiff and defendants mutually agreed, by written instruments duly executed by each of them and duly delivered, that the plaintiff should sell to the defendants and that the defendants should buy of the plaintiff from two hundred to six hundred tons of such old rails, and that the plaintiff should deliver the same to the defendants at the city of New York or of New Haven, at the option of the defendants, between August 1st and October 1st, 1880, and that the defendants should pay the plaintiff therefor, on receipt of the invoice of such rails and bill of lading with satisfactory insurance, twenty-eight dollars per ton, without or free from the duty to be paid to the United States.

3. On the 10th day of August, 1880, the plaintiff still having said six hundred other tons of old iron rails in its possession
14 and ownership, tendered the same to the defendants, and offered to deliver the same to the defendants at the city of New Haven or at the city of New York, as the defendants should elect.

4. On said 10th day of August, 1880, the defendants refused to receive said six hundred tons of old rails, or any part or portion thereof, at either the city of New Haven or of New York, and denied that they were bound to receive or pay for the same, or any part thereof, and have ever and at all times since refused to receive said iron rails or any part thereof.

5. On said 10th day of August, 1880, the market price of such iron rails, at the city of New Haven or the city of New York, was the sum of 27 dollars per ton, duty paid, which duty was eight dollars per ton, so that the plaintiff's said iron rails, at that time, at either said New Haven or New York, without or before the payment of said duty, were worth per ton the sum of 19 dollars per ton, and by the difference between said sum per ton and the said contract price, to wit, the sum of nine dollars per ton, the plaintiff was damaged by the refusal of the defendants to receive and pay for said six hundred tons of old rails, according to their said agreement.

15 The plaintiff claims damages on this count 7,000 dollars.

Fourth count.

The plaintiff further declares and says, in a plea of the case, that on and for a long time prior to January 31st, 1880, the plaintiff was a railroad corporation, owning and operating a railroad in said Province of New Brunswick, and then owned and had, in connection with its said business, six hundred tons of old iron rails which were for sale, and were other than the one thousand tons mentioned in the first count; that at the city of New Haven, in said district, on said 31st day of January, 1880, the defendants, in consideration that the plaintiff then and there in writing promised and agreed with the defendants to sell from two hundred to six hundred tons of such old rails to the defendants, to be delivered by the plaintiff to the defendants at the city of New Haven or at the city of New York, at the option of the defendants, between August 1st and October 1st, 1880, for the price of twenty-eight dollars per ton, without or free from the duty to be paid to the United States, promised and agreed with the plaintiff in writing to buy from it from two hundred to six hundred tons of such old rails, and to pay therefor
16 to the plaintiff, on receipt of the invoice of such rails and bill of lading, with satisfactory insurance, the sum of twenty-eight dollars per ton, without or free from the duty which would be paid to the United States; that on the 10th day of August, 1880, the plaintiff still had said 600 tons of old rails ready for delivery to the defendants, and then tendered the same to the defendants, and offered to deliver the same to the defendants at the city of New Haven or at the city of New York, as the defendants should elect, but the defendants, their promise aforesaid not regarding, then and there refused to receive said 600 tons of old iron rails, or any part or portion thereof, at either the city of New Haven or the city of New York, and denied that they were bound to receive or pay for said 600 tons of old rails, or any part or portion thereof, and have ever and at all times since refused to receive said 600 tons of old rails, or any part or portion thereof; that the market price of such old rails at the time of the defendant's refusal to receive the same at either the city of New Haven or the city of New York was the sum of twenty-seven dollars per ton, duty paid, and that such duty then was eight dollars per ton, so that the market price of the
17 plaintiff's said old iron rails at that time, either in New Haven or in New York, without duty, was the sum of nineteen dollars per ton, and that by the refusal of the defendants to receive and pay for such old rails the plaintiff was damaged by the difference between said contract price and the said market price to the amount of seven thousand dollars.

All which is to the plaintiff's damage the sum of thirty thousand dollars, and for the recovery thereof with costs this suit is brought.

John W. Alling, of New Haven, is recognized in the sum of one hundred and forty dollars, conditioned to prosecute this suit to effect and answer all damages in case the plaintiff fail to make good his suit.

Hereof fail not, but hereof due service and return make according to law.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Hartford, in the said district, this 24th day of August, A. D. 1880.

E. E. MARVIN, *Clerk.*

18 DISTRICT OF CONNECTICUT, *ss:*

TOWN OF EAST HAVEN, *the 1st day of September*, 1880.

Then and there, by virtue of this writ, and by the special direction of John W. Alling, the plaintiff's attorney, I made an attachment (by lodging with the town clerk of said town of East Haven an attested certificate of attachment by me signed, describing the property attached, the parties to this suit, and the court to which this writ is returnable, and the amount of damages therein claimed, said certificate being, in all respects, as directed by the statutes of the State of Connecticut) of all the right, title, and interest of Edwin S. Wheeler and William J. Isaacson, the within named defendant-, in and to a certain lot, tract, or parcel of land, with all the buildings thereon, lying in said town of East Haven, and bounded as follows, to wit: Beginning at the northeasterly corner of the addition to a building known as the wire works, and from thence running S. 80° 19′ 20″ one hundred ninety-three $\frac{4}{10}$ feet to a mere stone near a —— tree; thence 74° 32′ W. one hundred sixty-two feet to a mere stone; thence N. 17° W. fifty-two $\frac{8}{10}$ feet to the Quinnipiac —— where a mere stone is placed; thence to the intersection of land for-
19 merly of W. O. Nettleton's southerly line at high-water mark, 80 feet to line at high-water mark; thence S. 17° 19′ 20″ E. along the S. west corner of a small barn, and thence S. 29° 57′ 20″ sixty-seven $\frac{3}{10}$ feet to place of beginning, as will more fully appear from the map of said parcel of land on page 243, vol. 20 of East Haven Land Records, in a deed from the assignees of the bankrupt estate of Charles Atwater & Co. to Edwin S. Wheeler, and being land formerly owned in whole or in part by the New Haven Wire Company; and on the first day of said September, A. D. 1880, I left in said town clerk's office a true and attested copy of this writ, and of my endorsement hereon, and I also, on the second day of said September, left a like, true, and attested copy of this writ, and of my endorsement thereon, on the hands of Edwin S. Wheeler, one of said defendants, in the town of New Haven, said district of Connecticut; and at the same time and place also left a like, true, and attested copy of this writ in the hands of Edwin S. Wheeler, as the agent of and managing partner of William J. Isaacson, one of said defendants, said Wheeler being in control and management of the property of the said Isaacson, and said Isaacson, on said second day of September, A. D. 1880, not being within my precincts.

Attest: GEO. R. BILL,
Deputy Marshal.

Fees.

Travel to serve and return 42 miles	$2 52
3 services	6 00
3 copies	7 50
Certificate of attachment	50
Paid town clerk of East Haven	40
Time searching records	1 00
4 endorsements	2 00
	$19 92

20 And on the 24th day of August, 1880, John W. Alling, Esq., entered his appearance for the plaintiff, and on the 11th day of April, 1881, S. A. Galpin, Esq., entered his appearance as the defendant.

And on the 24th day of March, 1882, amendment to complaint was filed, in the words and figures following, viz:

21 *Amendment of Complaint.*

In the Circuit Court of the United States for the Second Circuit.

NEW BRUNSWICK & CANADA RAILWAY CO. *vs.* E. S. WHEELER & CO.

The plaintiff, by leave of the court, and in pursuance of the agreement of parties, answered the complaint in said cause by striking out the 2d and 4th counts.

By its attorney, JOHN W. ALLING.

And on the 25th day of April, 1882, answer of defendants was filed, in the words and figures following, viz:

22 *Defendants' Answer.*

United States Circuit Court, District of Connecticut.

NEW BRUNSWICK & CANADA R. R. CO. *vs.* E. S. WHEELER & CO.

Answer as to first count.

Paragraph 1st. 1. The defendants admit that the plaintiff was and is a railroad corporation as alleged, but whether it had on the 31st day of January, 1880, one thousand tons of old iron rails they have no knowledge.

Paragraph 2d. The defendants admit that on said 31st of January negotiations were had between the defendants and one James Murchie, who purported to act as vice-president, and the agent of the plaintiffs, which negotiations terminated in written instruments executed by the defendants and by the said Murchie, acting as the agent of said plaintiff, which said written instrument set forth the mutual agreement that the plaintiff should sell to
23 the defendants, and that the defendants should buy of the plaintiff one thousand tons of twenty-two hundred and forty

pounds each of iron rails at the price of thirty dollars per ton, exclusive of duty, upon the terms as to place and time of delivery and of payment as set forth in said complaint.

On the 16th day of February, 1880, the market price at the cities of New York and New Haven of old iron rails per ton of twenty-two hundred and forty pounds, exclusive of duty, was thirty-four dollars; and on said 16th day of February the said plaintiff corporation, by a recorded vote of its directors held on that day, under the pretext of confirming said sale, passed a formal resolution that the tons of iron rails so sold, as set forth in said written instrument of January 31st, were tons of two thousand pounds only, and repudiated the contract evidenced by said written instruments, and bearing date January 31st, 1880, and refused to recognize the same as imposing upon it any obligation to deliver one thousand tons of twenty-two hundred and forty pounds each of iron rails at the price of thirty dollars per ton, exclusive of duty, upon the terms, as
24 to place and time of delivery and of payment, as set forth in said complaint, and forwarded to the defendants a certified copy of such recorded vote.

The defendants, upon receipt thereof, remonstrated against such action by said corporation, and demanded that said corporation should reconsider its vote of repudiation and accept the contract evidenced by said written instruments of January 31st, 1880, and that it should forthwith notify the defendants of such reconsideration and acceptance, to the end that the defendants might safely make contracts with third parties for the sale of said iron rails at their advanced price, but said plaintiffs refused to respond to said remonstrance or to take any notice thereof, and as long as the market price of said iron rails continued to remain over said price of thirty dollars per ton of twenty-two hundred and forty pounds, exclusive of duty, persisted in said vote of repudiation.

Paragraph 3d. On the 14th day of June, 1880, the market price in said cities of New York and New Haven of said iron rails per ton of twenty-two hundred and forty pounds was fifteen dollars, exclusive of duty, and the defendants admit that on the said 14th day of June the plaintiff corporation notified the defendants that
25 said corporation was then prepared to deliver and proposed to deliver one thousand tons of twenty-two hundred and forty pounds each of iron rails, at the price of thirty dollars per ton, exclusive of duty, upon the terms as to place and time of delivery and of payment as set forth in said contract; whether the said plaintiff, on said 14th day of June, 1880, still had said one thousand tons of old rails in its possession and ownership as alleged in said paragraph 3, the defendants have no knowledge.

Paragraph 4. The defendants admit that they declined to accept the plaintiff's proposal of June 14th, and to that extent only they admit the allegations of paragraph 4.

Paragraph 5. The defendants admit that the market price of iron rails in the cities of New York and New Haven on the 14th and 15th of June, 1880, was fifteen dollars per ton of twenty-two hundred and forty pounds.

The other allegations of paragraph 5 are denied.

26 By way of counter-claim:

1st. The foregoing statements of this answer are made part of this counter-claim.

2d. By reason of said vote of repudiation and the neglect and refusal of the plaintiffs to respond to the defendants' request for its reconsideration the defendants were unable safely to make contracts with third parties for the sale of such iron and rails at their advanced price, which they otherwise would have done to their great profit.

The defendants claim under this counter-claim five thousand dollars damages.

27 Answer to 3d count.

Paragraph 1st. 1. The defendants admit that the plaintiff was and is a railroad corporation as alleged, but whether it had on the 31st day of January, 1880, six hundred other tons of old iron rails they have no knowledge.

Paragraph 2d. 2. The defendants admit that on the said 31st day of January negotiations were had between the defendants and one James Murchie, who purported to act as the vice-president and agent of the plaintiffs, which negotiations terminated in written instruments executed by the defendants and by the said Murchie, acting as the agent of said plaintiff, which said written instruments set forth a mutual agreement that the plaintiff should sell to the defendants and that the defendants should buy of the plaintiff from two hundred to six hundred tons of twenty-two hundred and forty pounds each of iron rails at the price of twenty-eight dollars per ton, exclusive of duty, upon the terms as to place and time of delivery and of payment, as set forth in said complaint.

28 On the 16th day of February, 1880, the market price at the cities of New York and New Haven of old iron rails per ton of twenty-two hundred and forty pounds, exclusive of duty, was thirty-four dollars on said 16th day of February, 1880, the said plaintiff corporation, by a recorded vote of its board of directors held on that day, under the pretext of confirming said sale, passed a formal resolution that the tons of iron rails so sold as set forth in said written instruments of January 31st were tons of two thousand pounds only, and repudiated the contract evidenced by said written instruments bearing date of January 31st, 1880, and refused to recognize the same as imposing upon it any obligation to deliver from two hundred to six hundred tons of twenty-two hundred and forty pounds each of iron rails at the price of twenty-eight dollars per ton, exclusive of duty upon the terms as to place and time of delivery and of payment, as set forth in said complaint, and forwarded to the defendants a certified copy of such recorded vote.

The defendants, upon receipt thereof, remonstrated against such action by said corporation and demanded that said corpora-

29 tion should reconsider its vote of repudiation and accept the contract evidenced by said written instruments of January 31st, 1880, and that it should forthwith notify the defendants of

such reconsideration and acceptance, to the end that the defendants might make safely contracts with third parties for the sale of said iron rails at the advanced price, but said plaintiffs refused to respond to said remonstrance or to take any notice thereof, and as long as the market price of said iron rails contin-ed to remain over said price of twenty-eight dollars per ton of twenty-two hundred and forty pounds, exclusive of duty, persisted in said vote of repudiation.

Paragraph 3. On the 10 of August, 1880, the market price in said cities of New York and New Haven of said iron rails per ton of twenty-two hundred and forty pounds was nineteen dollars, exclusive of duty; and the defendants admit that on the said 10th day of August, 1880, the plaintiff corporation notified the defendants that said corporation was then prepared to deliver and proposed to deliver six hundred tons of twenty-two hundred forty pounds each of iron rails, at the price of twenty-eight dollars per ton, exclusive of duty, upon the terms, as to place and time of delivery and
30 of payment, as set forth in said complaint; whether the said plaintiff on said 10th day of August, 1880, still had said six hundred other tons of old rails in its possession and ownership, as alleged in paragraph 3, the defendants have no knowledge.

Paragraph 4. The defendants admit that they declined to accept the plaintiff's proposal of August 10th, and to that extent only they admit the allegations of paragraph 4.

Paragraph 5. The defendants admit that the market price of iron rails in the cities of New York and New Haven on the 10th day of August, 1880, was nineteen dollars per ton of twenty-two hundred and forty pounds, exclusive of duty, and they admit that the duty was eight dollars per ton of twenty-two hundred and forty pounds.

The other allegations of paragraph 5 are denied.

31 By way of counter-claim:

1st. The foregoing statements of this answer are made part of this counter-claim.

2d. By reason of said vote of repudiation, and the neglect and refusal of the plaintiffs to respond to the defendants' request for its reconsideration, the defendants were unable safely to make contracts with third parties for the sale of said iron rails at their advanced price, which they otherwise would have done to their great profit.

The defendants claim under this counter-claim three thousand dollars damages.

31½ And on the 25th day of April, 1882, the plaintiff filed replication, in the words and figures following, viz:

32 *Replication.*

United States Circuit Court, District of Connecticut.

NEW BRUNSWICK & CANADA R. R. Co. *v.* E. S. WHEELER & Co.

To the answer to the first count—

1. The plaintiff denies that the written instruments referred to in the second paragraph of the answer called for a ton of 2,240 lbs., the

expression in said instruments being the word "tons," and nothing more.

The plaintiff has no knowledge that on the 16th day of February, 1880, the market price at the cities of New York & New Haven of old iron rails was $34 per ton of 2,240 lbs., exclusive of duty, nor did the plaintiff, on the 16th day of February, 1880, by a vote of its directors, repudiate the agreement theretofore made between the plaintiff and defendants on the 31st day of January, 1880, nor refuse to be bound by said contract of that date, as expressed in said written instruments.

That part of paragraph second of the answer, which commences with the following words: "The defendants, upon receipt
33 thereof, remonstrated against such action," &c., to the end of said paragraph, is denied, except that the plaintiff did not reply to the only written communication it received from the defendants in February, 1880.

2. The plaintiff admits that the ton of iron rails referred to in paragraphs 3d & 5th of the answer as worth $15 per ton, exclusive of duty, was a gross ton, so called, or a ton of 2,240 lbs., the market price of a ton of such old rails of 2,000 lbs. being, on the 14th & 15th day of June, 1880, one dollar and eighty cents less, or thirteen $\frac{20}{100}$ dollars per ton.

Answer to counter claim on first count:

1. All the allegations of the first count of the complaint and of the replication to the answer thereto are made part of the answer to said said counter-claim.

2. For answer to the second paragraph of said counter-claim the plaintiff says that it was in no manner responsible for the alleged inability of the defendants to make contracts with third parties for sales of said iron rails, and whether there was in fact such inability the plaintiff has no knowledge.

34 Replication to answer to the third count.

1. The plaintiff denies that the written instruments referred to in the second paragraph of said answer called for a ton of 2,240 lbs., the expression in said instruments being the word "tons," and nothing more.

The plaintiff has no knowledge that on the 16th day of February, 1880, the market price at the cities of New York and New Haven of old iron rails was $34 per ton of 2,240 lbs., exclusive of duty. Nor did the plaintiff on the 16th day of February, 1880, by a vote of its directors, repudiate the agreement theretofore made between the plaintiff and defendants on the 31st day of January, 1880, nor refuse to be bound by said contract of that date, as expressed in said written instruments.

That part of paragraph second of said answer which commences with the words "The defendants upon receipt thereof remonstrated against such action by said corporation," &c., to the end thereof, is denied, except that the plaintiff did not reply to the only written communication it received from the defendants in Feb., 1880.

2. The plaintiff admits that the ton of iron rails referred
35 to in paragraphs 3d & 5th of said answer as worth $19 per ton, exclusive of duty, was a gross ton, so called, or a ton of 2,240 lbs., the market price of a ton such old rails of 2,000 lbs., being on the 10th day of August, 1880, two $\frac{16}{100}$ dollars less, or sixteen $\frac{84}{100}$ dollars per ton.

Answer to counter-claim on third count:

1. All the allegations of the third count of the complaint and of the replication to the answer thereto, are made part of the answer to said counter-claim.

2. For answer to the second paragraph of said counter-claim, the plaintiff says that it was in no manner responsible for the alleged inability of the defendants to make contracts with third parties for sales of said iron rails, and whether there was in fact such inability the plaintiff has no knowledge.

35½ And on the 25th day of April, 1882, rejoinder was filed in the words and figures following, viz:

36 United States Circuit Court, District of Connecticut.

NEW BRUNSWICK & CANADA R. R. Co. *v.* E. S. WHEELER & Co.

The defendants, by leave of the court, rejoin to the plaintiff's replication, that if the written instruments referred to in the second paragraph of the answer do not call for a ton of 2,240 pounds, then the defendants deny that said written instruments evidence, or that there ever existed, any mutual contract between said parties, as is alleged in the second paragraph of the first and third counts of said complaint, and under that issue the defendants withdraw their counter-claims.

And on the 25th day of April, 1882, the following stipulation was filed in said cause, viz.:

37 United States Circuit Court, District of Connecticut.

NEW BRUNSWICK & CANADA R. R. Co.
vs.
E. S. WHEELER & Co. } At Law.

The plaintiffs in the above-entitled cause stipulate and agree to try the issues therein to the court.

To the extent that any question of law may be claimed by either party to be effected by the admission or exclusion of evidence, the parties unite in the request that the court admit, subject to exception, any evidence that the counsel offering the same shall in good faith offer as pertinent to the issue.

The parties also unite in requesting the court in its finding, if one be made, to rule upon the admissibility of the testimony or evidence so taken, subject to exception and objection, to the same effect as if the case had been tried to the jury, to the end that both parties may

have the same right of exception to such ruling as if the cause had been tried to a jury.

Plaintiffs by their attornies, INGERSOLL & ALLING.
Defendants by their attornies, PHELPS & BEACH.

37½ And at the term of said court, held at New Haven, on the fourth Tuesday of April, 1882, the plaintiff, by Messrs. Ingersoll and Alling, their attornies, duly appeared, and the defendants, by Messrs. Phelps and Beach, their attornies, also appeared, and said cause was fully heard.

And on the 8th day of June, 1882, finding of facts and opinion was filed, in the words and figures following, viz:

38 Circuit Court of the United States for the District of Connecticut.

NEW BRUNSWICK AND CANADA RAILROAD COMPANY
v.
E. S. WHEELER & COMPANY.

SHIPMAN, J.: This is an action at law which was tried by the court, the parties having waived a jury trial by the written stipulation which is a part of the record. The facts in the case which are found to be true, the testimony which was objected to, the rulings of the court upon said objections, and the exceptions to said rulings, are as follows:

The averments of the complaint in regard to the citizenship, residence, incorporation, and partnership of the respective parties are true.

The New Brunswick and Canada Railroad Company is a corporation which owns and manages a railroad running from St. Stephens, in New Brunswick, to Holton, in the State of
39 Maine, a distance of about one hundred miles. At the time of the transactions hereinafter mentioned, the corporation had eight directors who owned nearly all of the capital stock of the company. At the organization of the company a few years *years* ago, there were but eight owners. The business of said directors was transacted very often without the formality of votes, but by verbal instructions to the president and more after the manner of a partneship than of a corporation.

In 1878, the directors commenced to relay the road with new steel rails, and one thousand tons were bought for that purpose. On July 24, 1879, the directors passed the following vote: "Resolved, That the president be authorized to purchase 2,000 tons of steel rails if he deems it advisable to do so."

Negotiations for this purpose were thereafter commenced which resulted in a contract, executed about February 6th or 7th, 1880, with an English firm, for the purchase of that amount of steel rails. They were to arrive some time thereafter. As reliance was
40 place upon the money to be obtained from the sale of the old rails for the payment of the new, the directors of the corporation, in conversations and by verbal instructions given from time

to time before the completion of said contract, both at directors' meetings and at occasional interviews elsewhere, but not by vote passed at any meeting, verbally authorized and instructed their president to sell the old rails belonging to said company and then upon the road-bed, and gave him full authority to do whatever was necessary for that purpose. When Mr. James Murchie, the vice-president of said company, was about to leave St. Stephens for New York and the eastern cities, in January, 1880, upon business of his own, the president gave him express instructions to sell said old rails, the approximate weight of which was well understood, for 75 tons of old rails would be taken up by the laying 100 tons of new rails, and in pursuance of said instructions said Murchie, as vice-president of the company, entered, at New Haven, on January 31,
1880, into the written contract with the defendants for the
41 sale of 1,000 tons, and also for the sale of 200 to 600 tons
which contract is contained in Plaintiff's Exhibits 1 and 2 hereto annexed.

On Feburary 16, 1880, at a meeting of the directors of the plaintiff corporation, the following votes were passed.

"*Resolved*, That the contract made by Mr. Murchie with Messrs. E. S. Wheeler & Co., of New Haven be agreed to, a memo. to this effect to be furnished to Mr. Murchie to forward to Messrs. Wheeler & Co."

(After discussion upon another subject.)

"*Resolved*, That the following sale old of rails made by Mr. Jas. Murchie to Messrs. E. S. Wheeler and Co., be confirmed.

Sold Messrs. E. S. Wheeler & Co. one thousand tons of old rails for delivery in New York or New Haven at their option before August the 1st next, at $30 (thirty dollars) per ton of 2,000 lbs., the duty to be paid by Wheeler & Co., and also two hundred to six hundred for delivery in New York or New Haven, between August 1st and October 1st at twenty-eight ($28) per ton of 2,000 lbs., the duty to be paid by Wheeler & Co.

In each case, cash against invoice, bill of lading, insurance policy in satisfactory company."

42 On February 17, 1880, Mr. Murchie sent the defendants the letter hereto annexed marked, Defendants' Exhibit B.

On February 28, 1880, the defendants replied to said letter of Murchie, and sent to him, as vice-president, the letter hereto annexed, marked Defendants' Exhibit D, which letter was duly received, but to which no reply was made.

No other communication, verbal or written, passed between the plaintiff and defendants until about June 10th, 1880, when Mr. Murchie called upon the defendants and asked them whether they would have those rails delivered in New Haven or New York, and said that the defendant was ready to deliver them, and that the tons were to be 2,240 pounds each.

The defendants declined to receive any rails upon the ground that the plaintiff had repudiated the contract of January 31st or that it had ceased to exist by the plaintiffs' act. The plaintiffs thereupon sent the defendants the letter of June 14th, 1880, hereto annexed

and marked Defendants' Exhibit E, to which the plaintiff replied by letter of June 15, 1880, hereto annexed and marked, Defendant's Exhibit F.

43 On June 30, 1880, the plaintiff tendered in fact, under the contract of January 31, 1880, to the defendants, a cargo of old iron rails of about sixty-five tons of 2,240 pounds to the ton, at the city of New Haven, and the defendants declined to receive the same, or to say where they should be delivered, whether at New Haven or New York, or to give any instructions whatever on the subject.

The plaintiff, on August 10th, 1880, sent to the defendant the letter of that date, hereto annexed and marked Plaintiff's Exhibit 3, to which the defendant replied by letter of August 21, 1880, hereto annexed and marked Plaintiff's Exhibit 4. All the letters hereinbefore mentioned were duly and seasonably received by the respective parties to whom they were sent.

The defendant never received, but always, after June 10th, 1880, refused to receive any of said one thousand tons, or of said six hundred tons, either at the city of New York or at New Haven, although the same were duly and properly tendered to them on June 10th, June 14th, June 30th, and August 10th. The plaintiff had, at said respective dates and before August 1st, 1880, 1,000 tons of

44 rails for delivery under the contract of Jan'y 31st, 1880, and also had 600 other tons of rails between August 1st and October 1st, 1880, for delivery under said contract, and was, at said respective dates, upon which tender was made, able, ready, willing, and anxious to deliver said iron and to comply with the contract of January 31st by the delivery of 1,000 and 600 tons of 2,240 pounds each.

It was agreed (subject to the plaintiff's right of objection to the admission of evidence to prove the same, to which evidence and to the proof of which fact, the plaintiffs duly and seasonably objected upon the ground that the statutes hereinafter quoted show the meaning of the word "ton," but the court admitted the same, to which ruling the plaintiff duly and seasonebly objected) that a ton of iron rails, or other scrap iron, when contracted for or bought and sold in the markets of the cities of New York and of New Haven, by the uniform usage or custom of those markets, means, and on January 31st, 1880, meant, a ton of 2,240 pounds, unless the

45 terms of the contract evidenced a different meaning upon its face.

The statute of the State of Connecticut in force on January 31st, 1880, and still in force, provides as follows: "In the sale of articles by avoirdupois weight, one hundred pounds shall constitute a hundred weight, and two thousand pounds shall constitute a ton, and the aliquot parts of a hundred weight and of a ton shall be reckoned accordingly." By the statutes of New York, Maine, and the Dominion of Canada, in force upon January 31, 1880, and still in force, two thousand pounds constitute a ton. The Parliament of the Dominion of Canada has control of weights and measures throughout the Dominion, and its statute provides that every contract made in the Dominion for any merchandise agreed for by weight or meas-

ure, shall be deemed to be made and had according to one of the Dominion weights or measures, ascertained by said act, and if not so made, according to the metric system.

On January 31st, 1880, and when the contract of that date was entered into by and between the said Murchie, acting in behalf of and as agent of said compeny, and E. S. Wheeler, one of the defendants, and acting for said firm, each of said parties con-
46 tracted for the sale and purchase of gross tons, in accordance with said custom, and each understood that he was contracting for tons of the customary weight—that is, 2,240 pounds each—and each knew that the word "tons," as used in said contract, meant, in his mind, tons of 2,240 pounds each, and there was no misnnderstanding between said persons as to the true intent and meaning of said contract.

The plaintiff duly and seasonably objected to any evidence in regard to custom or usage or the understanding of Mr. Murchie as to the meaning of the word "ton," but the same was admitted, and to said ruling the plaintiff duly and seasonably excepted.

It was agreed that the list hereto annexed and marked Plaintiff's Exhibit No. 6, correctly shows the marked price per ton of old iron rails in the markets of the cities of New York and of New Haven, at the dates respectively as given, and that a ton of such rails or other scrap iron, when quoted for the market price in said markets, means a ton of 2,240 pounds, the duty on such iron being eight dollars per ton of 2,240 pounds, and included in said
47 market price.

The damage to the plaintiff by reason of the refusal of the defendant to accept said one thousand tons was the sum of eleven thousand dollars, and the damage by reason of their refusal to accept said six hundred tons was the sum of fifty-four hundred dollars.

The defendant's counsel ask Mr. E. S. Wheeler, the only defendant who made the contract or had any knowledge of the business, the following questions, to each one of which the witness gave the answers respectively written in response to the respective questions. To each one of said questions and to each one of said answers the plaintiff objected, upon the ground that it was immaterial. The question and answer No. 2 was admitted to contradict a single statement in the testimony of Mr. Murchie. No. 8 was admitted, as was also the other testimony in regard to the meaning of the word "tons," as used in said contract, because a decision upon the question of admissibility became immaterial in view of the plaintiff's conduct
48 in tendering gross tons, and, to avoid dispute, agreeing to the defendant's construction of the contract. No. 9 was excluded. The remaining questions and answers were considered to be properly in evidence for the purpose of enabling the court to ascertain the effect of the silence of the plaintiff after the letter of February 28th, upon the defendant's previous position in regard to the contract—the previous position having been that of affirmance. To the rulings against the objection of the plaintiff *the plaintiff*, and to the ruling in favor of the objection of the plaintiff, the defendants duly and seasonably excepted.

No. 1. Between January 21st and February 17th, 1880, did you have any opportunities of disposing of the 1,000 tons of rails about which you had contracted with the plaintiff?

Ans. No. 1. We had repeated opportunities. Mr. Murchie called on Saturday, January 31st, and on Monday we could have sold the rails for that future delivery at $4.00 per ton profit, and on Tuesday at $5.00 per ton profit.

49 No. 2. Do you know of any manufactory in New Haven which uses old iron rails?

Ans. No. 2. No.

No. 3. State the object for which you bought these rails.

Ans. No. 3. I bought these rails to sell, not to manufacture.

No. 4. Had you other opportunities to sell these rails?

Ans. No. 4. We had other opportunities to sell, but these offers were firm offers, made by responsible parties.

No. 5. Why did you not take these offers?

Ans. No. 5. Because Mr. Murchie had come to us a stranger, representing a company of which we had never before heard, bringing no letter of introduction, and showing by his conversation that he was not familiar with old rails, and because he had sold them at much less than the market price of the day. I had grave suspicions whether we should get the property, and the amount

50 involved was so large as to make it prudent for us to investigate the character and responsibility of the sellers. That investigation we could not make without some delay.

No. 6. After the letter of February 17th, did you make any attempt to sell the iron?

Ans. No. 6. No.

No. 7. Could you have sold it at a profit at that time?

Ans. No. 7. We could have sold at a large profit.

No. 8. State in regard to the truth of the statements made in your letter of February 28th.

Ans. No. 8. The statements made in our letter of February 28th are true. It correctly states our understanding of the contract.

No. 9. When did you first hear of the statute of Connecticut in regard to the meaning of the word "ton"?

51 Ans. No. 9. I first heard of the statute of Connecticut about a month ago from Mr. Beach.

The statutes of New Brunswick (Consolidated Statutes, page 750) provide that the contract of the agent of any corporation within the scope of his authority and the acts of a corporation shall be valid, though not authenticated by their seal."

The plaintiff did not intend by its votes, February 16th, or by the letter of February 17th to repudiate or abandon the contract of January 31st. It did attempt by said votes to draw from the defendants a modification of said contract. The defendants did not, by word or act, prior to June 10th change their previous position in regard to the contract, which position is stated in their letter of February 28th.

The conclusions to which I have come from the foregoing facts are as follows:

1st. That the president of the company was fully authorized to take all steps necessary to sell the iron rails, although the authority was not conferred by vote of stockholders or directors. That
52 this power to sell was not limited to his personal action, but that he was also fully authorized to employ substitutes or agents, and that James Murchie was duly authorized to make the contract of January 31st, 1880.

2d. That the question whether parol evidence was admissible to explain the meaning of the word "ton," as used in the contract of Jan'y 31st, 1880, in view of the statutes hereinbefore specified, or whether parol evidence was admissible to alter or vary the meaning of the word from that given in said statutes or either of them, are immaterial, inasmuch as the plaintiff, by its conduct in tendering tons of 2,240 pounds each, and by its letters of June 14th and August 10th, agreed, for the purpose of avoiding dispute, to the defendants' construction of the contract, and in fact, admitted that the contract should be taken to mean gross tons.

3d. Neither the votes of February 16, nor the letter of Mr. Murchie of February 17th, 1880, can fairly be considered a repudiation
53 of the contract, or an attempt to abandon it. The directors did not intend or want to repudiate or abandon, and no confirmation of the contract was needed; but they desired, by an apparent misunderstanding of the terms of the contract, to see whether the defendants would consent to such a modification of it, as was suggested by the addition of the words "of 2,000 pounds." But if these votes were a repudiation, the defendants, by their letter of February 28th, insisted upon the execution of the contract according to its true intent; and if it was then permitted to them to treat the contract as at an end by reason of the disingenuous conduct of the plaintiff's directors, they refused to do so, and continuously held the plaintiff to strict performance. When the plaintiff performs, the defendant having continuously called for execution of the contract, it is not competent for him to refuse to accept performance. But if, upon notice by the promisor of an executing contract that he will not perform, the promisee accepts the situation, and treats the contract as at an end, the promisee cannot afterwards, by changing his mind, compel the promisee to accept performance.

54 4. The silence of the plaintiff after the letter of February 28th raises a more doubtful question, but, I think, assuming that this silence amounted to a notice of non-intention on its part to complete the contract for gross tons, that the defendants, by their conduct, treated such notice of non-intention as inoperative, and insisted upon performance, and cannot, when the plaintiff is ready and willing to perform, refuse to accept its tender. The natural effect of the plaintiff's silence after the letter of February 28th was to create great uncertainty and to cause consequent annoyance and pecuniary loss to the defendants. Such pecuniary loss is not proved here, for I do not regard Mr. Wheeler's answers to questions 6 and 7 as proving any loss to which he was subjected by the silence of the plaintiff; but cases may easily arise where such silence would be very injurious to the other contracting party, and would be very censura-

ble. Assuming that the defendants would have been justified in regarding this silence as a continued affirmation of the construction which was given in the vote of the directors to the contract, and as a wrongful putting an end to it, they were silent on their
55 part, and continued to stand on the letter of February 28th, demanding performance. When the plaintiff performs, if the defendant has not declared by his words or conduct in regard to the subject-matter of the contract, that it is — an end, but has kept it alive and demanded fulfillment, he is bound to accept of performance. The law on this subject is stated in a recent English case by Ch. Justice Cockburn, as follows: "The law with reference to a contract to be performed at a future time, when the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of Hochster *v.* Delatour and the Danube and Black Sea Co. *v.* Xenos, on the one hand, and Avery *v.* Bowden, Reed *v.* Hoskins, and Barwick *v.* Buba, on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance, but in that case he keeps the contract alive for the benefit of the other party as well as his own; he
56 remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

5. The plaintiff is entitled to judgment for the sum of $16,400, with interest at six per cent. upon $11,000 from August 1st, 1880, and interest upon $5,400 from October 1st, 1880.

JOHN W. ALLING AND CHAS. R. INGERSOLL,
For the Plaintiff.

JOHN S. BEACH AND EDW'D J. PHELPS,
For the Defendants.

57 PL'T'F'S EXHIBIT NO. 1.

NEW HAVEN, *Jan'y* 31, 1880.

JAMES MURCHIE, Esq., *V. Pres't N. Brunswick & Canada R. R.*

DEAR SIR: We have this day bought of you as representative of the New Brunswick & Canada R. R. Co. one thousand tons old rails, for delivery in New York or New Haven (at our option), at $30, without duty, and delivery to be before Aug. 1st, and also two (2) to six hundred tons for delivery in New York and New Haven between August 1st and October 1st, at $28, without duty. Terms in each

case cash ag'st invoice B. L., and insurance policy in satisfactory company.

Very resp'y, E. S. WHEELER & CO.

PL'T'F'S EXHIBIT No. 2.

NEW HAVEN, *Jan'y 31st*, '80.

E. S. WHEELER & Co., *New Haven:*

We hereby accept your order of this date, and will deliver rails at price and on terms named.

Resp., NEW BRUNSWICK & CANADA R. R. CO.
JAMES MURCHIE, *V. Pres't.*

58 DEF'TS' EXHIBIT B.

ST. STEPHEN, *Feb. 17th*, 1880.

MESS. E. S. WHEELER & Co., *New Haven.*

DEAR SIRS: I herewith enclose a copy of resolution passed at our meeting of directors yesterday.

This confirmed the sale "made by me to you" by the company, which was done on my arrival home.

The car wheels and chains that we had on hand were sold before I came home. We will have a large quantity by the time we ship our rails.

Please acknowledge the above.

Yours, truly, JAMES MURCHIE.

New Brunswick & Canada Railroad Company.

Minute of a resolution passed at a directors' meeting Feb'y 16th, 1880:

Resolved, That the following sale of old rails, made by Mr. Jas. Murchie to Messrs. E. S. Wheeler & Co., New Haven, Conn., be
59 confirmed: Sold Messrs. E. S. Wheeler & Co. one thousand tons of old rails, for delivery in New York or New Haven, at their option, before August the 1st next, at thirty dollars ($30) per ton of 2,000 lbs., the duty to be paid by Wheeler & Co., and also two hundred to six hundred tons, for delivery in New York or New Haven between August 1st & October 1st, at twenty-eight ($28) per ton of 2,000 lbs.. the duty to be paid by Wheeler & Co. In each case cash against invoice bill of lading. Insurance policy in satisfactory company.

True copy: F. H. TODD, *Pres.*

DEF'TS' EXHIBIT D.

NEW HAVEN, *Feb'y 28th*, 1880.

JAS. MURCHIE, Esq.,
Vice-Pres't New Brunswick & Canada R. R. Co., St. Stephens, Canada.

DEAR SIR: We rec'd duly your favor of the 17th inst. enclosing what purports to be a certified copy of a resolution adopted by the

directors of the N. B. & C. R. R. Co., in reference to the sale of old rails made by you on behalf of that Co. to us on the 31st
60 ulto. We assume that this resolution was passed merely as matter of form, and a copy has been sent us for our information solely, as no mention was made at the time of the negotiations that you acted subject to any approval by your Co. We understood then and understand now that the sale made at that time on behalf of your Co. was an absolute and final unconditional sale. We do not understand, further, that this resolution was forwarded to us with the view of in any way modifying that sale in any of its terms.

Furthermore, we understood at the time, and now understand, that the No. of pounds in each ton of this contract, there being no contrary specification when the contract was made, was not 2,000, but 2,240. Old rails, like other scrap and like pig-iron, are bought and sold by the gross ton, not only in this market, but in every foreign market. The custom of the trade fixing 2,240 as the standard No. of pounds in a ton of old rails is universal, and can be excluded from operating on contracts only by distinct conditions fixing some other quantity. No such conditions were mentioned in the
61 contract of your Co. with us, and we look, therefore, for the delivery of the rails within the dates named in the contract of your Co., and in "gross," not net, tons. We make no doubt but that your understanding of that contract is in accord with ours, and that in so far as this resolution fixes a different No. of pounds for each ton, that it so fixes them by an oversight on the part of the directors. We hope to hear from you at your early convenience.

Very truly, yours,

(Signed) E. S. WHEELER.

DEF'TS' EXHIBIT E.

69 CHURCH STREET, NEW HAVEN, CONN., *June 14th*, 1880.

Messrs. E. S. WHEELER & Co.

DEAR SIR: We now have ready for delivery the 1,000 tons of old rails sold you Jan. 31st, 1880, by contract of sale of that date, made by you & James Murchie, as representing the New Brunswick & Canada Railroad Company. By the terms of that contract the 1,000 tons are to be delivered before Aug. 1 next in New York or New Haven, at your option.

62 You will please inform us at your early convenience at which of those ports the rails shall be delivered.

In your letter to James Murchie, as vice-president of our company, of Feb. 28th last, you construe the contract as meaning that the ton of rails specified in that contract is 2,240 lbs., or the gross ton; now, without waiving any of our rights under that contract, but to avoid dispute, we tender you the delivery of the thousand tons, at gross weight of 2,240 lbs. to the ton, and ask your determination whether the delivery shall be made at New Haven or New York.

NEW BRUNSWICK & CANADA RAILROAD CO.,

By F. A. PIKE, *Special Agent.*

DEF'TS' EXHIBIT F.

Copy.

NEW HAVEN, *June* 15, 1880.

NEW BRUNSWICK & CANADA RAILROAD CO.

GENTLEMEN: Your letter of yesterday, advising that you are ready to deliver to us 1,000 tons of old rails, and asking us to designate a port of delivery, is received.

As we do not recognize the existence of any such contract of sale as your letter contemplates, we have no instructions to
63 offer upon the subject.

It is true that we tried last winter to buy of you 1,000 gross tons of old rails at a price which would have netted us a large profit; but this we had to lose, as your company insisted they were selling net gross, and no contract resulted upon which we could base our sales.

Very truly yours, E. S. WHEELER & CO.

PL'T'F'S EXHIBIT No. 3.

69 CHURCH STREET,
NEW HAVEN, CONN., *Aug.* 10*th*, 1880.

Messrs. E. S. WHEELER & Co.

DEAR SIRS: By the terms of your contract with The New Brunswick & Canada Railroad Company, of the date of Jan. 31st, 1880, you bought of the company two hundred to six hundred tons of old rails, to be delivered to you in New York or New Haven, between August 1st and October 1st, 1880.

We now have six hundred tons of such old rails ready for delivery to you, and respectfully inquire at which port—New York or New Haven—you wish the delivery to be made.

64 In your letter to James Murchie, as vice-pres't of said railroad company, of Feb. 28th last, you construe the contract as meaning that the ton of rails specified in that contract is 2,240 lbs., or the gross ton; now, without waiving any of our rights under that contract, but to avoid dispute, we tender you the delivery of the six hundred tons at gross weight of 2,240 lbs. to the ton, and ask your determination whether the delivery shall be made in New Haven or in New York, or whether, in view of your action concerning the 1,000 tons mentioned in the same contract, a delivery at all shall be made.

Respectfully yours,
THE NEW BRUNSWICK & CANADA RAILROAD COMPANY,
By JOHN W. ALLING, *Attorney.*

PL'T'F'S EXHIBIT No. 4.

N. HAVEN, *Aug.* 21, 1880.

THE NEW BRUNSWICK & CANADA RAILWAY CO.

GENTLEMEN: We have your favor of the 10th inst., wherein you

ask shipping instructions for certain old rails under the terms of an alleged contract with us.

65 Upon the 15th of June last, in answer to a similar request from you, we stated that we did not recognize the existence of any such contract, and that we therefore had no instructions to offer. Our views regarding this matter have undergone no change since our last letter on this subject, and we do not see that we can give you any further direction regarding the disposition of the rails named by you.

Truly yours, E. S. WHEELER & CO.

PL'T'F'S EXHIBIT No. 6.

U. S. Cir. Court, District of Conn. April T., 1882.

NEW BRUNSWICK & CANADA R. R. Co. *vs.* E. S. WHEELER & Co.

In the above case it is agreed that the following list correctly shows the market price per ton of old iron rails in the markets of the cities of New York and of New Haven at the dates respectively as given, and that a ton of such rails or other scrap iron, when quoted for the market price in said markets, means a ton of

66 2,240 lbs., the duty on such iron being eight dollars per ton of 2,240 lbs., and included in said market price.

It is also agreed (subject to the plaintiff's right of objection to the admission of evidence to prove the fact) that a ton of said rails or other scrap iron, when contracted for or bought and sold in said market, by the uniform usage or custom of those markets, means, and at the date of said alleged contract in controversy meant, a ton of 2,240 lbs., unless the terms of the contract evidenced a different meaning upon its face.

PLAINTIFFS,
By INGERSOLL & ALLEN.

Defendants reserving right to offer evidence consistent with stipulation.

By JNO. S. BEACH.

67 *Price of Old T-Rails in N. Y., as reported in N. Y. Commercial Bulletin.*

Feb'y 4th, '80. @ 43 and 43.50.
" 7th, '80. 42.50 and 43.
" 11th, '80. 42 and 43.
" 14th, '80. 42 and 42.50.
" 18th, '80. 42.50.
" 21, '80. Sales of 3,000 tons, 42 to arrive.
3,000 tons do. at a shade under 42.50.
" 25th, '80. 42.50 steady.
" 28th, '80. 42.00; best bids 50c. to 100 under the learn of 1,000, @ 41.50 spot.
March 3rd, '80. 41.00 and 42.00.
" 10th, '80. 40 to 41.

March 13th, '80. As low as 40.00 for ship't, while up to 40.00 for spot.
" 17th, '80. 117½ shillings @ fi. We learned of 3,000 tons @ 39.00 & 40.00.
" 20th, '80. 38.00 to 39.00.
" 24th, '80. 37.00 and 38.00.
" 27th, '80. 37.50 to 38.50.
" 31st, '80. 37.00 to 38.00.
April 3d, '80. About 37.00 and 38.00.
" 7th, '80. About 35.50 to 36.00 would readily accepted.
" 10th, '80. Not over 35.00. Cable late this afternoon 105½
68 shillings.
" 14th, '80. 34.00 to 35.00.
" 21st, '80. 34.00 & 35.00 spot.
" 24th, '80. 3,000 tons sold, @ 32.00 & 33.00. Lot of 250 tons, @ 30.00, to arrive.
" 28th, '80. About 30.00. Holders views are 1.00; 2.00 over that.
We learned of 2,500 tons sold 29 to 30 here.
May 1st, '80. 28.50 @ 29.00; 1,800 tons @ 28.00 @ 29.00 here.
" 19th, '80. 25.00 @ 26.00, to be full outside quotations.
" 22nd, '80. 25.00 @ 26.00.
" 26th, '80. 27.00 to 28.00, bottom figures. We hear of 4,000 tons @ 26.00, in store.
" 29th, '80. 26.00, general price.
June 2nd, '80. About 26.00 for spot parcels.
" 9th, '80. 24 to 24.50.
" 12th, '80. 24.50 @ 25.00, spot lots.
" 16th, '80. 24.50 @ 25.00, but the bulk of the supply held for 26.00.
" 19th, '80. 24.50 to 25.00.
" 23rd, '80. 23.50 @ 24.50.
" 26th, '80. 24.00 @ 24.50.
" 30, '80. We hear of T offered at 23.50.
July 3rd, '80. 24.00 @ 24.50.
" 7th, '80. 23.50 to 24.50.
69 April 10th, '80. 24.00 @ 25.00, fair price.
" 14th, '80. About 24.50.
April 17th, '80. Bids of 26.00.
July 21st, '80. Holders *maning* 26.50.
" 24th, '80. It is doubtful if less than 26.00 would be accepted; as a rule holders ask 28.00.
" 28th, '80. About 27.00; heard of 100 tons @ 28.00 ex. store.
" 31st, '80. 27.00 and 27.50.
Aug. 4th, '80. 28.00 @ 29.00.
" 11th, '80. About 27.00.
" 18th, '80. About 27.50 @ 28.00.
" 28th, '80. About 27.00.
Sept. 1st, '80. About 27.00; holders' views about 1.00 more.
" 4th, '80. Stock offered about 27.00.
" 8th, '80. About 300 tons at 27.00 deliv. Phil.

Sept. 11th, '80. Some lots at 26.00, but more generally asked.
" 15th, '80. 26 @ 27.
" 18th, '80. About 26.00.
" 25th, '80. 27.00 full outside quotation.
" 29th, '80. There are buyers at 26.00; at auction 2,669 tons sold at 26.25, taken by Cleveland Roll. Mill.
Oct. 2nd, '80. $26 to 26.50 1,000 ms. sold @ $25.75.

70 Whereupon it is considered by the court here, this 12th day of July, 1882, that in this case the issue is for the plaintiff, and that the plaintiff recover of the defendants the sum of $18,264.80 dollars debt, and 102.47 dollars costs, in the whole the sum of 18,367.27 dollars, and that execution issue therefor.

71 United States Circuit Court, District of Connecticut. April Term, 1882.

NEW BRUNSWICK & CANADA RAILROAD COMPANY
v.
E. S. WHEELER & CO.

Be it remembered that on the trial of the above-entitled cause, under stipulation to the court, and upon the pleadings as on file, the court having filed with the clerk of this court its finding of facts and its conclusion of law thereon—

The defendants, before judgment, file this their bill of exceptions thereto:

Upon the trial of this case, the facts and evidence appearing therein were as stated in the finding and opinion of the court as on file, to which reference is had as part of this bill of exceptions.

Upon said trial the defendants claimed as follows:

1st. That upon the facts found and upon the evidence in the case, the said James Murchie had no legal authority from the plaintiff to bind it finally by the contract purporting to be evidenced by
72 the Exhibits 1 & 2, and the same did not become a contract, if at all, until adopted or ratified by the plaintiff.

2d. That upon the facts as found, and under the pleadings in the case, there was no such meeting of the minds of the parties as to make the contract purporting to be evidenced by the plaintiff's Exhibits 1 & 2 a binding one between them.

3d. that the meaning of the word "tons" in said Exhibits 1 & 2 was material, and continued and remained material up to and after June 14th and August 10th, respectively, and did not on those dates respectively become immaterial by reason of any consent or admission of the plaintiffs then made.

4th. That neither of the statutes of Connecticut or of New York or of Massachusetts, or of the Dominion of Canada, could legally measure or fix the quantity of pounds to the ton as that word was used in Exhibits 1 & 2 at 2,000 pounds to the ton.

73 5th. That the vote of the directors of the plaintiff corporation, of February 16, 1880, and the letter of Mr. Murchie to

the defendants, accompanying the same, was a repudiation of the contract purporting to be evidenced by the Exhibits 1 & 2.

6th. That the omission of the plaintiff corporation to reply to the defendants' letter of February 27th, in connection with the said vote and letter last mentioned, estops it to deny its intent to repudiate the contract evidenced by Exhibits 1 & 2, and from a recovery in this action.

7th. That the writings, Exhibits 1 & 2, were not treated by the plaintiffs as evidencing any contract until the vote of the directors of the company of February 16, 1880, and by that vote the plaintiffs denied the existence of any contract which evidenced an agreement on its part to assume an obligation to deliver tons of rails of 2,240 pounds to the ton, and were thereafter estopped from setting up, to their own gain and to the defendants' loss, any such asserted contract.

8th. That if the Exhibits 1 & 2 did, at their date, evidence
74 a contract between the plaintiff and defendant-, the subsequent vote of February 16, 1880, and the correspondence and conduct of the plaintiff contemporaneous therewith and subsequent thereto, discharge the defendants from any obligation to accept the iron at the time it was tendered to them on the 14th of June and the 10th of August, 1880.

9th. That by reason of the circumstances attending the claimed inability of the defendants to sell said iron rails, as detailed in the testimony of E. S. Wheeler, which is set out in the finding, and the fall in price of old iron rails, after Jan. 31, 1880, the plaintiff is not entitled to recover in this action.

10th. That if the plaintiff is entitled to judgment for damages by reason of the refusal of the defendants to accept the tender made on the 10th of August, 1880, of the 600 tons named in Exhibits 1 & 2, it is not entitled to damages beyond those sustained by reason of the defendants' refusal to accept 200 of said 600 tons.

But the court overruled each and all of said claims of the defendants, whereupon the defendants except thereto, and to each and all of the rulings and decisions upon matters of law contained in
75 the finding and judgment of the court, and pray that their exceptions may be made part of the record in said cause.

The foregoing bill of exceptions is allowed, and the presiding judge did, in pursuance of the defendants' request and of the statutes in such case provided, allow, sign, and seal this bill of exceptions, containing the several matters aforesaid, at and during the term of the court at which the trial was had and judgment rendered, to wit, at the April term of said court, 1882.

N. SHIPMAN, [L. S.]
District Judge.

76 I, Edwin E. Marvin, clerk of the circuit court of the United States for the district of Connecticut, do certify that the foregoing is a true copy of the original record in this court in the mat-

ter of The New Brunswick and Canada Railroad Co. *v.* E. S. Wheeler & Company.

In testimony whereof, I have hereunto set my hand and the seal of said court at Hartford, in said district, this 19th day of August, 1882.

E. E. MARVIN, *Clerk.*

Endorsed on cover: Connecticut C. C. U. S. No. 279. E. S. Wheeler & Company, plaintiff in error, *vs.* The New Brunswick and Canada Railroad Company. Filed 27th September, 1882.

115-29

Supreme Court U.S.
FILED.
APR 14 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

October Term, 1884.—No. 279.

E. S. WHEELER & CO.

PLAINTIFFS IN ERROR,

vs.

THE NEW BRUNSWICK & CANADA RAILROAD COMPANY.

J. S. & J. K. BEACH,
E. J. PHELPS,
For Plaintiffs in Error.

NEW HAVEN:
TUTTLE, MOREHOUSE & TAYLOR, PRINTERS.
1885.

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PLAINTIFFS IN ERROR,

vs.

THE NEW BRUNSWICK & CANADA RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

STATEMENT.

This suit was brought to the Circuit Court of the United States for the District of Connecticut, by the New Brunswick & Canada R. R. Company, a New Brunswick corporation, against E. S. Wheeler & Company, citizens of Connecticut, claiming thirty thousand dollars damages for breach of contract to purchase 1600 tons of old rails.

The cause was by stipulation tried to the Court, which gave judgment for the Plaintiff in the sum of $18,264.80 and costs.

In both counts in the declaration upon which the trial proceeded, being the first and third (the second and fourth having been stricken out), the defendants in error declared upon contracts in writing for the sale by it to the plaintiffs in error of a certain number of tons of iron rails.

Record, fol. 9–13–21.

In their answer to these counts the plaintiffs in error averred in substance that agreements of sale were executed between them and an agent of the defendants in error, on the 31st of Jan., 1880, of the number of tons mentioned in the declaration, *which were tons of* 2240 *pounds each*, at $28. and $30. per ton.

That on the 16th of Feb. 1880 the price of such rails being then $34. per ton, the defendant in error under pretext of confirming the sale, passed a formal vote of its directors that the tons specified in the agreements, *were tons of* 2000 *pounds each*, and refusing to recognize the agreements as imposing an obligation to deliver tons of 2240 pounds. And forwarded to the plaintiffs in error a certified copy of the vote.

That the plaintiffs in error, on receipt thereof, remonstrated against such action, and demanded that the defendant in error should reconsider the same, and accept the contract for the sale of gross tons, and that it should forthwith notify the plaintiffs in error of such reconsideration and acceptance, to the end that they might safely make contracts with third par-

ties for the sale of the rails at the advanced price. But that defendant in error took no notice of this remonstrance, and refused to reply thereto, so long as the price remained above $30 per ton.

That on the 16th day of June 1880, the market price having fallen to $15 per ton, the defendant in error proposed to deliver to the plaintiffs in error one thousand tons of rails, at the price of $30 per ton of 2240 pounds. And on the 18th day of August 1880, the market price being $19 per ton, proposed to make further delivery of six hundred tons of 2240 pounds each, at $28 per ton. Each of which tenders the plaintiffs in error refused to receive.

Record, fol. 23–25, 28–30.

To these answers the defendant in error replied—*denying that the agreement of sale was for* 2240 *pounds.*

And denying that by the vote of Feb. 16th it had repudiated the agreement.

Record, fol. 32–34.

To which the plaintiffs in error rejoined, that if the agreement of sale did not call for tons of 2240 pounds, then they deny that any mutual contract took place between the parties.

And under this issue they withdrew a counter-claim they had annexed to their answer, for damages sustained by breach of the contract on the part of the defendant in error.

Record, fol. 36.

It appeared upon the trial that the directors of the defendant in error "who owned a majority of the capital stock" verbally authorized its president to make sale of the rails in question. That he verbally instructed one Murchie, the vice president, to effect the sale. That Murchie went to New Haven and had an interview with plaintiffs in error, to whom he was a stranger, the result of which was the execution of the following papers.

NEW HAVEN, JAN. 31, 1880.

JAMES MURCHIE, ESQ., V. Pres't N. Brunswick & Canada R. R.

Dear Sir: We have this day bought of you as representative of the New Brunswick & Canada R. R. Co. one thousand tons old rails, for delivery in New York or New Haven (at our option) at $30 without duty, and delivery to be before Aug. 1st, and also two (2) to six hundred tons for delivery in New York or New Haven between August 1st and October 1st, at $28, without duty. Terms in each case cash against invoice B. L., and insurance in satisfactory company.

Very respectfully,

E. S. WHEELER & Co.

NEW HAVEN, JAN'Y 31, 1880.

E. S. WHEELER & Co., New Haven:

We hereby accept your order of this date and will deliver rails at price and on terms named.

Respectfully,

New Brunswick & Canada R. R. Co.

JAMES MURCHIE, V. Pres't.

Record, fol. 40–41, and 50.

Plaintiff's Exhibit, No. 2.

On the 16th Feb. 1880 (the price of iron rails being then $34 per ton), the directors of the defendant in error held a meeting at St. Stephens, New Brunswick, and adopted the following resolutions in reference to the contract above mentioned.

"Resolved, that the following sale of old rails, made by Jas. Murchie to Messrs. E. S. Wheeler & Co., New Haven, Conn., *be confirmed*; Sold Messrs. E. S. Wheeler & Co. one thousand tons of old rails, for delivery in New York or New Haven, at their option, before August the 1st next, at thirty dollars ($30) *per ton of* 2,000 *lbs.*, the duty to be paid by Wheeler & Co., and also two to six hundred tons, for delivery in New York or New Haven between August 1st and October 1st, at twenty-eight ($28) *per ton of* 2,000 *lbs.*, the duty to be paid by Wheeler & Co. In each case cash against invoice bill of lading. Insurance policy in satisfactory Company."

And the next day caused a copy of the resolution, duly certified, to be transmitted to the plaintiffs in error, in a letter signed by Mr. Murchie, as follows:

ST. STEPHENS, FEB. 17th, 1880.

Mess. E. S. WHEELER & Co., New Haven.

Dear Sirs: I herewith enclose a copy of a resolution passed at our meeting of directors yesterday.

This confirms the sale "made by me to you" by the company which was done on my arrival home.

The car wheels and chains that we had on hand were sold before I came home. We will have a large quantity by the time we ship our rails.

Please acknowledge the above.

Yours truly,

JAMES MURCHIE.

Deft's Exhibit B. Record, fol. 58.

To this letter on Feb. 28th, 1880, the plaintiffs in error replied as follows.

NEW HAVEN, FEB'Y 28th, 1880.

JAS. MURCHIE, ESQ.,

Vice-Pres't New Brunswick & Canada R. R. Co., St. Stephens, Canada.

Dear Sir: We received duly your favor of the 17th inst., enclosing what purports to be a certified copy of a resolution adopted by the directors of the N. B. & C. R. R. Co., in reference to the sale of old rails made by you on behalf of that Co. to us on the 31st ulto. We assume that this resolution was passed merely as a matter of form, and a copy has been sent to us for our information solely, as no mention was made at the time of the negotiations that you acted subject to any approval by your Co. We understood then and understand now that the sale made at that time on behalf of your Co. was an absolute and final unconditional sale. We do not understand, further, that this resolution was forwarded to us with the view of in any way modifying that sale in any of its terms.

Furthermore we understood at the time, and now understand, that the number of pounds in each ton of this contract, there being no contrary specification when the contract was made, was not 2,000 but 2,240. Old rails, like other scrap and like pig-iron, are bought and sold by the gross ton, not only in this market but in every foreign market. The custom of the trade fixing 2,240 as the standard No. of pounds in a ton of old rails is universal, and can be excluded from operating on contracts only by distinct conditions fixing some other quantity. No such conditions were mentioned in the contract of your Co. with us, and we look, therefore, for the delivery of the rails within the dates named in the contract of your Co., and in "gross" not "net," tons. We make no doubt but that your understanding of that contract is in accord with ours, and that in so far as this resolution fixes a different No. of pounds

for each ton, that it so fixes them by an oversight on the part of the directors. We hope to hear from you at your early convenience.

Very truly yours,
E. S. WHEELER.

Deft's Exhibit D. Record, fol. 58.

No other communication verbal, or written, passed between the parties, until June 10th, 1880.

In the meantime, the plaintiffs in error, who had bought the rails to sell, might and would have sold them at a profit, but for their belief that the contract had failed and would not be fulfilled by the defendant in error.

Record, folio 48–51.

On the 10th of June, the market price of rails having fallen to $15 per ton, a verbal offer to deliver the rails was made by the defendant in error, which was declined.

And on the 14th of June 1880, the following letter was addressed by the defendant in error to the plaintiffs in error.

69 CHURCH STREET,
NEW HAVEN, CONN., June 14th, 1880.

Messrs. E. S. WHEELER & Co.,

Dear Sirs: We have now ready for delivery the 1,000 tons of old rails sold you Jan. 31st, 1880, by contract of sale of that date, made by you and James Murchie as representing the

New Brunswick and Canada R. R. Company. By the terms of that contract the 1,000 tons are to be delivered before Aug. 1, next, in New York or New Haven at your option.

You will please inform us at your early convenience at which of those ports the rails shall be delivered.

In your letter to James Murchie as Vice-president of our company, of Feb. 28th, last, you construe the contract as meaning that the ton of rails specified in that contract is 2,240 lbs., or the gross ton; now, without waiving any of our rights under that contract, but to avoid dispute, we tender you the delivery of the thousand tons, at gross weight of 2,240 lbs. to the ton, and ask your determination whether the delivery shall be made at New Haven or New York.

New Brunswick & Canada Railroad Co.,
By F. A. PIKE, Special Agent.

To which reply was made by the plaintiffs in error as follows:

NEW HAVEN, June 15th, 1880.

NEW BRUNSWICK & CANADA RAILROAD CO.,

Gentlemen: Your letter of yesterday, advising us that you are ready to deliver to us 1,000 tons of old rails, and asking us to designate a port of delivery, is received.

As we do not recognize the existence of any such contract of sale as your letter contemplates, we have no instructions to offer upon the subject.

It is true that we tried last winter to buy of you 1,000 gross tons of old rails at a price which would have netted us a large profit; but this we had to lose, as your company insisted that they were selling net instead of gross, and no contract resulted upon which we could base our sales.

Very truly yours,
E. S. WHEELER & Co.

Deft's Exhibit F, Record, fol. 63.

On the 10th of August 1880 a similar letter was addressed by the defendant in error to the plaintiffs in error, proposing to deliver six hundred tons of rails. To which a similar reply was made.

Plaintiffs' Exhibits Nos. 3 & 4, Record, fol. 64–65.

The market price of old rails and its variations during all the time covered by the transactions in question, is shown in *Plaintiffs' Exhibit No.* 6, *Record, fol.* 66—70, which is stipulated to be correct.

From the prices therein given, eight dollars per ton being the amount of duty, is to be deducted.

The court found as a fact, that the contract of January 31st was for gross tons; that both parties so understood and intended; and that there was no misunderstanding between them.

Record, fol. 46.

That Murchie was duly authorized on the part of the defendant in error to make the contract.

Record, fol. 52.

That the vote of the directors of the defendant in error of Feb. 16th, 1880, and the letter in which that vote was communicated to the plaintiffs in error, were not a repudiation of the contract, nor an attempt to

repudiate it, but were an attempt to deceive the plaintiffs in error.

"The directors did not intend or want to repudiate or abandon, and no confirmation of the contract was needed; but they desired by an apparent misunderstanding of the terms of the contract to see whether the defendants" (plaintiffs in error) "would consent to such a modification of it, as was suggested by the addition of the words 'of 2,000 pounds.'"

Record, fol. 53.

And the court further remarks in its opinion:

"The plaintiff" (defendant in error) "did not intend by its vote of Feb. 16th, or by the letter of Feb. 17th, to repudiate or abandon the contract of Jan. 31st. It did attempt to draw from the defendants" (plaintiffs in error) "a modification of said contract."

"The defendants" (plaintiffs in error) "did not by word or act, prior to June 10th, change their previous position in regard to the contract, which position is stated in their letter of Feb. 28th." Record, fol. 51.

Judgment was rendered in favor of the defendant in error, for the difference between the market value and the contract price, of 1600 tons of rails, at the dates when delivery was tendered, with interest.

The findings, opinion and judgment of the court will be found in the *Record, fol.* 38 *to* 57.

The result of these facts is this:

1. The contract in question was made on the part of defendant in error, through an agent, the extent of whose authority was unknown to the plaintiffs in error.

2. And it was for a certain number of tons without anything to show whether gross or net tons were intended.

3. Immediately on report of the contract to the defendant in error by its agent, it asserted:

(1) That the sale required confirmation by it in order to be binding.

(2) That it only confirmed the contract as one for net tons.

4. To this the plaintiffs in error did not assent but asserted the contrary and called for an early reply.

5. No reply was given.

6. The plaintiffs in error therefore assumed that the contract had failed, and omitted to dispose of the iron, for future delivery as they otherwise would have done.

7. Long after, when the market price had fallen to one-half the contract price, the defendants in error tendered the iron at gross tons, still denying that such was the contract.

8. The plaintiffs in error refused to receive it, on the ground that no contract had taken effect.

9. The Court gave judgment for the defendant in error, on the ground that both its assertions were untrue; that the agent was authorized to contract without confirmation, and that both parties understood that gross tons were intended.

Assignments of Error.

That the Circuit Court erred in giving judgment for the defendant in error upon the case as stated in the record. And judgment should have been given for the plaintiffs in error, for the reasons following, among others.

1. No legal contract between the parties to the action was established.

2. If such contract existed at any time, the defendant in error was estopped from setting it up as against the plaintiffs in error, by the pleadings and by the facts proved.

3. If such contract existed, it was repudiated and terminated by the defendant in error in such manner as to discharge the plaintiffs in error from further obligation.

4. Upon the pleadings and facts shown by the record, the cause of action stated in the declaration was not sustained and the defendant in error was not entitled to recover.

5. If the defendant in error was entitled to recover, the damages awarded were greater than was warranted by the contract, for the breach of which the recovery was had.

Points.

First.

The written agreement of Jan. 31st, 1880, under which the defendant in error recovered its judgment, is silent on the very material question whether the word "tons" therein employed specified gross or net tons. Either meaning is equally consistent with the language and context.

If there was an actual misunderstanding between the plaintiffs in error and the agent of the defendant in error at the time the written agreement was made, in reference to the kind of tons intended by its language, the one understanding the word to mean gross tons, and the other understanding it to mean net tons, then no contract resulted.

Ocean Ins. Co. vs. Carrington, 3 Conn., 357.
N. H. & Hartford R. R. Co. vs. Jackson, 24 Conn., 516.
Eliasin vs. Henshaw, 4 Wheaton, 225.
Utley vs. Donaldson, 94 U. S., 47.
Pollock on Contracts, 418.

That the plaintiffs in error understood that gross tons were intended, is shown by all the evidence, is found by the Circuit Court, and is virtually conceded.

The question therefore, was, whether the agent of the defendant in error understood it in the same way.

The vote of the defendant in error of Feb. 16th and the letter of Feb. 17th, in which it was transmitted to the plaintiffs in error, contained a distinct assertion that net tons were intended and understood by their agent, by the word "tons" in that agreement.

The vote and letter were intended to be so understood, as the Circuit Court have found; they were in fact so understood by the plaintiffs in error, as shown by their reply, and such is the necessary import of the language.

The words of the vote were

"That the following sale made by Mr. James Murchie be confirmed." Proceeding then to state the sale as being of *net* tons.

And the letter of Feb. 16th, signed by Murchie, says, speaking of the resolution enclosed, "This confirms the sale made by me to you," &c.

After the receipt of the reply of the plaintiff in error of Feb. 28th, insisting upon a different construc-

tion of the agreement in this particular, and as late as June and August, when the final tenders were made of the rails by the defendant in error it still declined to admit that the contract was for gross tons.

Record, fol. 62 and 64.

And as has been already pointed out, the defendant in error avers in the pleading that the contract was for net tons, and issue was joined thereon, and on the trial the defendant in error objected to all evidence tending to prove that the contract was for gross tons.

If the reiterated and persistent assertion, both by the defendant in error and its agent who made the contract, is to be taken as true, then it is plain that no meeting of the minds of the parties took place, and no contract resulted.

It has been found by the Circuit Court to have been intentionally and fraudulently untrue, and a judgment in favor of the defendant in error is only reached by finding the material issue against it.

Second.

The same observations apply to the further statement in the vote of the defendant in error and in the letter by which it was transmitted, that Murchie was not authorized to complete the contract except subject to the approval of the principal.

This statement, though indirectly made in both the letter and the vote, was plainly intended to be so understood by the plaintiffs in error, and was so understood, as shown by their reply.

Murchie's agency was special. The plaintiffs in error had no evidence of the extent of it except his word. If the subsequent statement in the vote and in Murchie's letter was true, then no contract took place. Because the defendant in error declined to confirm the contract as the plaintiffs in error understood it, and as the Circuit Court have found it really was. And the plaintiffs in error declined to accept the construction claimed by the defendant in error.

Third.

But if the statements in the vote and in the letter of the defendant in error are to be taken as false, and as intended to deceive the plaintiffs in error, as the Circuit Court has found them to have been, then the defendant in error is estopped from denying their truth, after they have been acted on by the plaintiffs in error to their detriment. One is estopped from setting up a contract that can only be established by proof of the untruth and fraudulent purpose of his assertion.

Taylor vs. Ely, 25 Conn., 259.
Winter vs. Hall, 39 Conn., 20.
Dickerson vs. Colgrove, 100 U. S., 578.
Baker vs. Humphrey, 101 U. S., 494.

The facts asserted in these statements in respect both to the extent of Murchie's authority, and to his understanding of the contract on the point in question, were fully and peculiarly within the knowledge of the defendant in error. They were not and could not have been known to the plaintiffs in error.

They were material, because they went to the existence of the contract.

The statements in regard to them were made by the defendant in error to be acted on by the plaintiffs in error, as the Circuit Court has found.

They were in fact believed and acted on by the plaintiffs in error, to their serious detriment. They were dealers in iron, and bought the rails to sell. They could and would have sold them subject to the delivery called for by the contract, at a considerable advance from the contract price. They omitted to do so because in consequence of these statements of the defendant in error, and its failure to reply to their letter of Feb. 28th, they understood that their contract had failed. And after the time for making a profit had passed, they still omitted, for the same reason, to make the sales they might have made, so as to have protected themselves in whole or in part from loss. So that when unexpectedly called on to accept the iron in June following, the price had fallen to one-half what they had agreed to pay.

The price list stipulated in the record shows that the rails could have been sold at a profit down to about the 20th of March. That from that time to April 7th, they could have been sold without loss. And from thence to the time of the tender to the plaintiffs in error the price steadily declined.

Exhibit No. 6, Record, fol. 67 to 69.

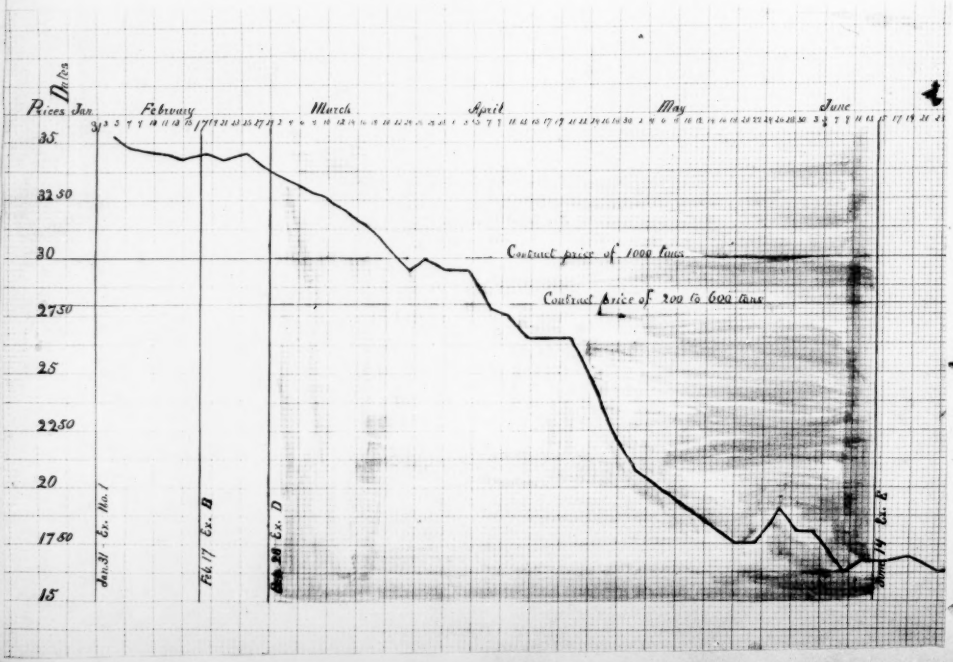
The following diagram is plotted from Exhibit No. 6.

The irregular line shows the market price of old rails without duty.

Horizontal lines indicate values.

Vertical lines indicate dates.

The shaded portion indicates the period of the silence of the defendant in error during its refusal to answer the letter of the plaintiffs in error.



Mr. Wheeler testifies as follows:

Q. "State the object for which you bought these rails."
A. "I bought these rails to sell, not to manufacture."

* * * * *

Q. "After the letter of February 17th did you make any attempt to sell the iron?"
A. "No."
Q. "Could you have sold it at a profit at that time?"
A. "We could have sold at a large profit."

The whole case shows that the plaintiffs in error did not desire or intend to escape from the contract. Nor was it their interest to do so because it was a very profitable one to them. Their letter of Feb. 28th shows them anxious to have it stand. It was only when the letter and vote of the defendant in error stating facts which if true defeated the contract, were followed by the persistent refusal of the defendant in error to reply to their letter claiming a different state of facts, that they became satisfied the contract had failed, and ceased to concern themselves in regard to it.

The case discloses therefore every element necessary to an estoppel on the defendant in error to deny the facts it had thus asserted, and to set up afterwards a contract the existence of which it had thus denied.

It would be a flagrant injustice if the plaintiffs in error who are conceded to have acted throughout in the utmost good faith, should be subjected to a heavy loss for the benefit of the party who is adjudged by the Court to have attempted successfully to deceive them, and whose statements were a deliberate fraud.

Fourth.

Another view may be taken of the case irrespective of the question of estoppel.

The contract, as evidenced by the written agreement, was ambiguous in a material particular which pervaded the whole of it. It was open to be construed either way, if the mutual understanding of the parties should be found to be that way. Or it might fail altogether, if on this point there turned out to be a misunderstanding.

Under these circumstances, a discussion between the parties on the point of the ambiguity arises, while the contract is still executory, and as soon as it is reported to the principal by the agent who made it.

The defendant in error asserts one view, and proposes to perform the contract as so understood. The plaintiffs in error assert the opposite construction, urged reasons in support of it, and call for an immediate reply. No reply is made.

In this discussion the plaintiffs in error were conceded to have acted in good faith. They had a right to assume that the asserted understanding of the defendant in error was in equal good faith; especially as they could not possibly know to the contray.

The contract was therefore incomplete as it stood in the original agreement. It could not be performed till the point left incomplete was agreed in. The negotiations that arose for this purpose terminated in no agreement.

To claim that the plaintiffs in error were bound to understand from the silence of the defendant in error that its assertion had been abandoned and the claim of the plaintiffs in error adopted, is not only unwarranted by the correspondenee, but would require them to have understood what was not true in point of fact. Because as has been seen, as late as the time of final tender, the defendant in error declined to concede the point, and averred to the contrary in its pleadings in the case, and upon the trial.

The letter of the plaintiffs in error fairly called for a reply. And failing to receive it they had a right to understand, as they did, that no agreement was reached.

"The term "contract" is used in the constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to, certain acts. Mutual assent to its terms is of its very essence."

Louisiana vs. Mayor of New Orleans, 109 U. S., 288.

Fifth.

If upon the circumstances of this case it can be maintained that a contract existed between the parties, which the defendant in error is not estopped by its pleadings or by the facts from asserting, such contract was repudiated by the defendant in error in such manner as to discharge the plaintiffs in error from performance.

The contract as originally made, though ambiguously expressed, was, as has been found by the Circuit Court, for gross tons, because both parties so understood and intended.

Record, fol. 46.

The vote and letter of Feb. 17th were not in themselves, and as the plaintiffs in error had then the right to understand them, a repudiation of the contract, although they asserted an untrue understanding as to the meaning of the word "tons," and an untrue statement as to Murchie's authority. They purported to be a distinct confirmation of the contract, and a proposal to perform it as understood by the defendant in error. And the plaintiffs in error could not know that the assertions were not in good faith.

The letter of Murchie transmitting the vote says,

"This confirms the contract made by me." And referring to some other property that had been spoken of between the parties, he says, "we will have a large quantity by the time we ship our rails."

Record, fol. 58.

The Circuit Court has found that the defendant in error did not intend by the vote and letter to repudiate the contract.

Record, fol. 51–2–3.

And the letter of the plaintiffs in error in reply, shows that they did not understand the defendant in error to have repudiated the contract.

The Circuit Court was therefore right in its conclusion that the letter and the vote, standing alone, can not "fairly be considered a repudiation of the contract, or an attempt to abandon it."

Record, fol. 53.

The plaintiffs in error were fully justified in assuming as they did, that the claim of net tons was either a mistake on the part of the defendant in error, or if not so, that it was a claim which in view of the suggestions made by them in reply ,the defendant in error might be induced to reconsider and recede from.

In no possible view of the case were they bound or even authorized to understand, that the claim was made in bad faith, and that as a statement of the understanding of the defendant in error it was a falsehood.

Their letter of Feb. 28th was therefore a most proper one, and clearly called for the reply which it demanded. It was made necessary by the conduct of the defendant in error.

Had the defendant in error replied to the letter, admitting that the understanding stated in the vote was not the true one, and accepting the contract as claimed by the plaintiffs in error, no question would ever have arisen.

And had the defendant in error in reply insisted on the understanding asserted in the vote, the plaintiffs in error would have had a right to understand that the contract had failed to take effect.

But their refusal to reply at all under the circumstances of the case, and upon the facts made to appear to the plaintiffs in error, was when taken in connection with the vote and letter that had raised the difficulty, a complete repudiation of the contract that is now found to have existed. But which the plaintiffs in error had been thereby led to suppose had never existed.

And more especially is this true, when it is remembered that the whole value of the contract to the plaintiffs in error, depended upon their prompt knowledge whether it was to be performed or not.

The silence of the defendant in error, in view of the correspondence that had previously occurred, was therefore justly construed by the plaintiffs in error either as proof that the contract had failed though misunderstanding to take effect, or if a contract had in fact taken place, as a repudiation of it, by the defendant in error. In either event it was at an end.

All the conduct and letters and pleadings of the plaintiffs in error show that they did so understand. Relinquishing thereby a contract which would have been very valuable to them had it been honestly carried out by the defendant in error, as it is now disclosed that it should have been.

It cannot be for a moment maintained that the question of repudiation turns upon the secret intent of the

defendant in error. It depends upon what the other party had a right to understand from the language and conduct of the defendant in error.

Sixth.

Upon this record the defendant in error has recovered a judgment of $18,264.80 against the plaintiffs in error for the assumed breach of a contract the existence of which it has never admitted or recognized, but has always denied.

I. It denied the existence of such a contract at its inception by a formal recorded vote of its directors.

II. It denied it once and again, in making tender of performance under another and a different asserted contract.

III. It denied it in the record pleadings of the cause.

IV. It denied it on the trial, and struggled to exclude all evidence offered to prove its existence.

Seventh.

The Circuit Court erred in applying to the facts and the pleadings in this cause the rules of law which govern the rights and obligations of parties to a recognized executory contract to be performed at a future time.

I. That law as quoted by the Circuit Court from Chief Justice Cockburn is this:

"The law with reference to a contract to be performed at a future time when the party bound to a performance announces prior to the time his intention not to perform it, may be thus stated. The promisee if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance, but in that case he keeps the contract alive for the benefit of the other party as well as his own. On the other hand, the promisee may if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and, may at once bring his action on a breach of it."

1st. The application of the rule of law above quoted assumes that the plaintiffs in error at the time they received the Murchie letter enclosing copy of the vote of the defendant in error, had their election either to treat the vote as inoperative upon a contract of which the defendant in error admitted the existence, but announced its intention not to perform, or to treat the vote as a wrongful putting an end to such a contract.

II. The plaintiffs in error had no such privilege of choice between the two remedies.

1st. When the Murchie letter enclosing this vote of the directors was received by the plaintiffs in error, there was at once presented to them the question, how is this apparent denial of the defendant in error of its obligation to deliver tons of 2240 pounds, under cover of their recognized obligation to deliver tons of 2000 pounds, to be interpreted? One of the partners may think it is made in good faith, and that there is a real misunderstanding; another partner concludes it is a

trick to escape in a safe way from a losing bargain by a pretended misunderstanding. The third partner suggests that it may be only a clerical error or oversight.

But clearly, before the firm can make any intelligent choice of remedy, from which choice, the rule of law as above quoted will infer their liabilities, or their rights, they must know, or be in fault for not knowing, which interpretation is the right one.

Because, if the first partner was right in his interpretation of "good faith," inasmuch as the plaintiffs in error understood in "good faith" that they were buying tons of 2240 pounds, if the defendant in error also in "good faith" understood that it was selling tons of only 2000 pounds, there was no contract.

If the interpretation of the second partner was right, that it was a mere trick, their respect for the law forbad them to think that the law could in any event aid its success, even if they then had a choice of remedies, and erred in their selection.

If the interpretation of the third partner was right, there was no occasion to seek any legal remedy, all that was needed was to advise the defendant in error of its oversight and request its speedy revision and correction.

This was at once done, but the ensuing silence of the defendant in error and its refusal to answer the letter of the firm of February 28th, as week after

week went by without an answer, demonstrated that the interpretation of the third partner of clerical error or oversight was wrong, and therefore that the interpretation of the first or second partner was correct.

But which was correct?

The plaintiffs in error now know (not from the defendant in error but from the Court) what is and was the true interpretation of its vote, and of its refusal to answer their letter.

They now know that the vote was a mere pretext, and that under pretense of confirming what Murchie had done, though it knew that his acts "needed no confirmation," it attempted by "an apparent misunderstanding of the terms of the contract" to protect itself against what then seemed to be a losing bargain.

But before the rules of law we are considering can be so applied to the plaintiffs in error as to impute to them any legal liabilities in what they did or omitted to do in this behalf during the months of February, March, April and May, 1880, it must be made to appear that they then knew, or were in fault for not knowing, what was the true interpretation of this vote and ensuing silence of the defendant in error.

It is not pretended that the plaintiffs in error then in fact knew or had any means of knowing that the vote of the directors of the defendant in error of February 16th, recorded upon its books, of which a certified copy was sent to them by its vice-president

through the mail from Canada, was a vote passed in bad faith, and did not mean what it purported to mean.

Certainly the plaintiffs in error were in no fault for not then so knowing.

They were justified in assuming that the directors of a corporation whose railroad ran—

"From St. Stephens in New Brunswick to Dalton in the State of Maine, a distance of about one hundred miles (folio 39), were honest men, and would not act in bad faith, although they "owned nearly all the capital stock of this company. (Folio 39).

And so they were justified in treating that vote (in the conceded absence of any oversight or clerical error), as meaning what it purported to mean. What that vote purported to mean was this:

"Mr. Murchie, our vice-president, has signed an agreement with you for 1,000 tons of old rails. He had no authority from us to sign that agreement, but we confirm the contract, provided there be added after the word 'tons,' the words 'of 2,000 pounds each," but unless such addition is made, we do not and shall not recognize any obligation under it."

The plaintiffs in error did so construe the vote, and what they did and omitted to do, was based upon that construction.

And as we have already seen (the defendant in error being the judge), its correspondence and pleadings demonstrate that this construction of the plaintiffs in error was the right one. In court and out of

court the defendant in error has been consistent in its denial that the instrument in writing of January 31, 1880, called for tons of 2240 pounds.

It may occur to the Supreme Court to enquire how it is, that the cause has reached this tribunal upon a judgment of the Circuit Court in favor of the defendant in error upon a contract which, assuming its claims to have been true and honest, never had any existence. The defendant in error insisting that when it signed the agreement it understood the agreement to be for tons of 2000 pounds, and not denying that the plaintiffs in error at the same time understood it to be for tons of 2240 pounds.

The answer to the enquiry is found in the fact that on the trial in the Circuit Court, the defendant in error claimed that although there was no mutual meeting of the minds of the parties when the instrument in writing of January 31, 1880, was signed by its agent, and therefore no contract resulted from any meeting of the minds of the parties, as they did not "each agree to the same thing in the same sense," yet the law evolved out of this instrument calling for 1000 "tons" "and nothing more" a contract binding on the defendants, (the plaintiffs in error), under and by virtue of the provisions of the statute law of the State of Connecticut, that "2000 pounds shall constitute a ton."

The Circuit Court found, and rightly found, that this claim of the defendant in error was untenable, for the

reason (among others) that the statute of Connecticut did not make it unlawful for the parties to contract for tons of 2240 pounds, and that in signing this instrument of January 31, 1880,

"each knew that the word 'tons' as used in said contract meant in his mind tons of 2240 pounds."

There can be no question but that this finding is in accord with the fact.

But we submit for the reasons above stated, that the Circuit Court erred in applying to the facts and pleadings in the cause, a rule of law which guided the Court to the conclusion that the plaintiffs in error were from February to June, 1880, keeping *that* contract alive for the benefit of the defendant in error.

Eighth.

The acts and omissions of the defendant in error preclude it from now claiming that the plaintiffs in error kept the contract alive for its benefit.

First—The Circuit Court has found that the letter of the plaintiffs in error in reply to that of Murchie enclosing vote of the directors, "was duly and seasonably received." (*Folio* 42.)

This letter notified the defendant in error that they do not consent to the contract as asserted in that vote, but insist on the terms of the original agreement as they understand it, and suggest that the terms of that agreement were so plain and well understood that the

assertion of the vote must have been "an oversight" and call for an early answer to this suggestion.

What was the duty of the defendant in error on receipt of that letter?

The plaintiffs in error were by reason of this vote honestly uncertain whether the announcement of the defendant in error that the "ton" of the contract is 2000 pounds was real, or was ostensible, or was the result of an oversight.

The defendant in error knew that the averred misunderstanding was only ostensible, and a mere pretext to thereby save itself from a loss resulting from the improvident contract of its agent.

Under these surroundings, we repeat, what was the duty of the defendant in error and of its directors, on receipt of that letter?

The duty was plain.

But unluckily for the plaintiffs in error the interests of its directors were not in accord with its duty.

If the directors abandon what is now proved to have been then their inchoate trick, by acquiescing in the suggestion of "an oversight" they lose money, for they "own nearly all of the capital stock of the company."

If they refuse to accept the suggestion of "an oversight," and by silence persist in their maneuvre, they can in no event lose money, and may make money.

Because if the market price should continue to be in excess of the contract price, its recorded vote passed in the day and time of the transaction and duly served upon the plaintiffs in error, is evidence final and conclusive, that the directors understood the essayed contract as calling for tons of only 2000 pounds, and it has preserved on file the letter of the plaintiffs in error which shows a different understanding by them, and which when compared with its vote demonstrates that there was no contract. They conclude therefore that silence is the wisest policy, so long as the market price continues to be higher than the contract price.

And they see also, looking at the other alternative, that if the market price should drop so as to make it profitable for them to sell rails at $38 per ton of 2240 pounds that there may in that event be money in their policy of silence.

If this alternative happens, they take from their files the letter of the plaintiffs in error insisting upon the contract for the purchase and sale of 1000 tons of 2240 pounds to the ton, and "without waiving their rights" under the contract as evidenced by their vote to insist on 2000 pounds as the "ton" of the contract when the time comes to deliver the "200 to 600 tons," they can tender 1000 tons of 2240 pounds, and upon refusal by the plaintiffs in error to accept, recover damages for this breach of *that* contract.

It is under this last alternative that the judgment appealed from was recovered.

And it is based upon the assumed legal theory that because the plaintiffs in error failed in their seasonable efforts to extort from the defendant in error its then admission of its now proven bad faith, they "kept the contract alive for the benefit of" the defendant in error.

This cannot be.

The rule relied upon by the Circuit Court which by reason of the inaction of one party retains vitality in a contract for the benefit of the other party must touch and lay hold of some element other than the fraud and bad faith of that other party.

The rule contemplates—

1st. The existence of a positive contract as distinguished from an ambiguous essay towards an agreement.

2d. A contract under which the parties to it have in good faith once mutually recognized some degree of duty or obligation.

3d. A promisor who announces his intention not to perform a positive contract and means what he says.

In such case the promisee is rightly put to his election, and if he chooses to regard the notice of the promisor as inoperative, he must abide the result, and why? For the reason that the law will not permit him

with perfect safety to himself, to speculate upon the hazard of a doubtful result, with possible gain to himself, and consequent loss to the promisor.

And this is the identical reason why the law under the facts and pleadings in this cause forbid this defendant in error from claiming that the plaintiffs in error kept this contract alive for its benefit.

It is too clear for argument that if either party were speculators, it was the defendant in error. But the action of its directors cannot be dignified as speculation because no element of hazard existed. With their opponents blind-folded, and the price list "Exhibit No. 6" for their dummy, they at no time ran any risk of losing the game.

We submit that "the executory contract to be performed at a future time" to which the rule of law quoted by the Circuit Court from Chief Justice Cockburn applies, is not the ambulatory and erratic contract of this controversy.

Ninth.

The statutes of Connecticut and New Brunswick fixing the number of pounds to be 2000 pounds to the ton, were properly treated by the Circuit Court as inapplicable to the case.

These statutes do not render it unlawful to contract for gross tons. And the Circuit Court has found as a fact that these parties did so contract and mutually understand.

And even had the statutes been otherwise applicable, this transaction would have been controlled by the United States statute providing that gross tons shall be 2240 pounds upon importations from foreign countries which are subject to duty.

The contract provided for such importations and for the payment of the duty.

And the right of Congress to regulate weights and measures is when exercised paramount to that of the States.

U. S. Rev. Stat., §§ 2503, 2951.

Tenth.

If the defendant in error was entitled to recover, the damages allowed were too large.

The contract as to the second delivery of iron rails was for "two to six hundred tons."

This was not a contract for six hundred tons.

Nor was it at the option of the defendant in error what amount within those figures, should be delivered.

The plaintiffs in error might as well claim that the quantity should be two hundred tons, as the defendant in error that it should be six hundred.

The true construction is, that the quantity contracted for is such number of tons, not less than two hundred or more than six hundred, as the parties might agree on the delivery of, when the time for delivery came. The amount, between those limits, was left open.

On that contract neither party could have forced the other to take or deliver more than 200 tons, if notified before the time of performance that not more than 200 tons would be accepted or delivered.

In this case the plaintiffs in error notified the defendant in error prior to any attempted delivery that no part of the iron would be accepted. Under these circumstances if more than 200 tons was tendered, the excess was at the risk of the defendant in error.

Damages should have been assessed, if at all, on 200 tons.

J. S. & J. K. BEACH,
E. J. PHELPS,
Counsel for Plaintiffs in Error.

115-29

Supreme Court of the United States,

October Term, 1884.—No. 279.

E. S. WHEELER & CO.

PLAINTIFFS IN ERROR,

vs.

THE NEW BRUNSWICK & CANADA RAILROAD COMPANY.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

J. S. & J. K. BEACH,
E. J. PHELPS,
For Plaintiffs in Error.

NEW HAVEN:
TUTTLE, MOREHOUSE & TAYLOR, PRINTERS.
1885.

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It seems to the plaintiffs in error that the "supplemental brief of the defendant in error in reply" releases them from troubling the Court with any answer to the principal brief of the defendant in error, other than by a review of the authorities it cites.

Revision of Authorities cited by Defendant in Error.

On page 23,

Miller vs. *Lord*, 11 Pick. 10, 24, 26.

The contest was as to what under the contract of partnership, was included in "profits." The Court say,

"It is claimed that there was not such a union of minds, as is necessary to constitute a binding agreement. This misunderstanding however, is *not sufficiently proved.*"

And the Court distinguish between this and

"The other cases cited, in which the misunderstanding was established by evidence."

The authorities cited on pages 32–35, in support of the claim that the Circuit Court erred, in finding that the minds of the parties met on the contract for 2240 pounds to the ton, may be passed, with a simple reference to the main brief of the plaintiffs in error on that point.

Of the American authorities cited on pages 43, 44,

Schuchardt vs. *Allens*, 1 Wall. 3–5–9,

Uttley vs. *Donaldson*, 94 U. S. 29–47.

may be taken as types.

The head note of the first case is,

"Where a *contract of sale is complete*, the vender cannot hold the vendee, to terms not agreed on, by sending him a bill or memorandum of sale, with such terms set out upon it, as that, 'no claim for deficiencies or imperfections will be allowed, unless made within seven days of receipt of goods.'"

In *Utley* vs. *Donaldson*, *supra*, the Court say,

"There can be no contract without the mutual assent of the parties. This is vital to its existence. There can be none, where it is wanting. It is as indispensable to the modification of a contract *already made*, as it was to the making of it originally."

The English authorities cited (pages 44, 48, 49, 56,) and the two Pennsylvania cases (pages 47 and 48),

Morgan vs. McKee, 77 Penn. St. 228–31.
Zuck vs. McClure & Co., 98 Penn. St., 541–45.

all take for their premises—

That two or more parties have entered into a contract to be performed at a future time.

The premises in every case assume, that the term "contract," is used in its ordinary sense, as embodying of its very essence the *mutual assent of the parties to its unambiguous terms, consenting to the same thing in the same sense;* and in all these cases, the question discused was,—if before the day of performance arrives, one party gives notice to the other, that he does not intend to perform,—what are the rights of the parties to whom notice is given?

In most cases, it is held that he has his election either to sue for the breach before the time of performance arrives, or to await that time and then bring suit.

The debated and decided points are, as to the rule of damages if suit is brought before time of performance, and as to the continued vitality of the contract, if the election is in favor of waiting for the time of performance before bringing suit.

Upon the question of error in computation of damages, (the error claimed being a computation on 600 tons, when the contract was for "from 200 to 600 tons.")

The defendant in error cites, (page 78)

Price vs. Dyer, 17 Vesey, 363

Dann vs. Spurrier, 3 Bos. & Pull, 399.

which decided that a lessee under a lease for 4, 8 or 12 years, may under the general rule that convenants are to be construed in favor of the grantee, hold for the longest term.

McNill vs. Clark, 7 Johns 466 (page 78)

By the condition of the bond the obligor had his election to pay $600 for a patent, or to account for the profits at the end of the year. He made no election. Held that the obligee could recover $600.

Parker vs. Pettit, 43 N. J. L. 512,

"a contract by one who has a quantity of straw on hand, to sell all he had to spare, not exceeding three tons, is not void for uncertainty, in not expressing the quantity of straw contracted to be sold. The quantity agreed to be sold may be proved by extrinsic evidence of the amount sold by the defendant to other parties."

Townsend vs. Wells, 3 Day, 327.

The note was to pay $80 in West India rum, sugar or molasses, at the election of the plaintiff within eight days.

"The promissee must elect, if he intends so to do, in such season as will allow the promissee to deliver the article within eight days. If he delays beyond that time, the promisor may deliver either one of the articles named."

Patchen vs. *Swift*, 21 Vt. 292 (page 83).

The defendant had the option either to surrender the premises or to assume and pay the mortgage debt on or before January 1, 1848.

"Where a contract is in the alternative to do one of two things, or to do a certain act or pay a sum of money on a day certain, the right of election before the day of performance is in the party who is to do the act, if he suffers the day to elapse without making his election, the right of election is in the party to whom the promise is to be performed."

Peck vs. *Hubbard*, 11 Vt. 612 (page 13).

Assumpsit on note for thirteen sheep, payable in the month of September, 1832, to be delivered at any place in Lyndon where the plaintiffs should elect.

"In such case the election of the place of payment is not a condition precedent, to recovery, but a mere privilege, which if not exercised in reasonable time, is waived."

Small vs. *Quincey*, 4 Greenleaf, 497 (page 79).

The defendant's agreement was,

"we agree to receive of John B. Osborn and Joseph Small, from one to three thousand bushels of potatoes *more or less*, to be delivered in Philadelphia, as soon as practicable, at fifty cents per bushel, to be delivered in good order. Portland, Sept. 14, 1825."

By the Court,

"As by *the terms of the contract*, the option of election was given to the plaintiff, with respect to quantity, we do not perceive why they could not lawfully make use of it."

The only remaining case cited by the defendant in error on this point, is one decided by the Supreme Court of New York about the beginning of the present century.

Disborough vs. *Neilson*, 3 John Cases 81.

The Court say (and we quote the whole opinion),

"By the *especial agreement* in this case, the defendants were bound to receive the whole 1000 barrels of meal, if tendered within the time specified. It was at the option of the plaintiffs only to deliver any quantity from 7000 to 1000 barrels, and the stipulation in that respect was for their benefit. It does not follow that the contract was not mutual. There was sufficient consideration on both sides, and a contract may be optional with one of the parties in part, or in whole, and obligatory on the other, *Douglass* 23, 1 *Term R.* 133, *Cowper* 218, *Giles* vs. *Bradley*, 2 *Johns Cases* 252."

This dictum is a literal copy from the opinion of the same Court in *Giles* vs. *Bradley*, 2 Johns Cases 253.

The defendant had sold the plaintiff a negro slave for $200, under an agreement that

"if the plaintiff and his wife do not like the boy the defendant would take him back within five months and refund the money.

The plaintiff "not liking the boy," for that reason returned him, within five months from the time of purchase.

It was in support of the plaintiffs' right of recovery that the Court stated the proposition copied into the opinion in *Disborough* vs. *Neilson*, and cited the same cases, *Douglass* 23, 1 Term R. 133; *Cowper* 218.

Douglass 23, *Weston* vs. *Downs*.

The defendant sold the plaintiff a pair of coach horses, which he agreed to take back if they did not suit, and were returned to him within a month. The plaintiff returned them and took another pair without making a new agreement. He offered to return this pair within a month, but defendant refused to receive them, and he brought assumpsit for the purchase money paid. Held, his suit should have been on the special contract, that assumpsit would not lie.

1 Term R. 183 (*Towers* vs. *Barrett*).

Plaintiff had paid defendant ten guineas for a one-horse chaise, on condition to be returned, if the plaintiff's wife should not approve of it. It was sent back at the expiration of three days, and *retained by the defendant*. Held, assumpsit would lie.

Cowper 218 (*Power* vs. *Wells*).

"If money and a horse are given in exchange for another horse *warranted sound*, which was unsound at the time, an action for money had and received, is not a proper action to try the warranty, nor will trover lie for the horse given in exchange, because the property is altered."

115-29

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"if the plaintiff and his wife do not like the boy the defendant would take him back within five months and refund the money.

The plaintiff "not liking the boy," for that reason returned him, within five months from the time of purchase.

It was in support of the plaintiffs' right of recovery that the Court stated the proposition copied into the opinion in *Disborough* vs. *Neilson*, and cited the same cases, *Douglass* 23, 1 Term R. 133; *Cowper* 218.

Douglass 23, *Weston* vs. *Downs*.

The defendant sold the plaintiff a pair of coach horses, which he agreed to take back if they did not suit, and were returned to him within a month. The plaintiff returned them and took another pair without making a new agreement. He offered to return this pair within a month, but defendant refused to receive them, and he brought assumpsit for the purchase money paid. Held, his suit should have been on the special contract, that assumpsit would not lie.

1 Term R. 183 (*Towers* vs. *Barrett*).

Plaintiff had paid defendant ten guineas for a one-horse chaise, on condition to be returned, if the plaintiff's wife should not approve of it. It was sent back at the expiration of three days, and *retained by the defendant*. Held, assumpsit would lie.

Cowper 218 (*Power* vs. *Wells*).

"If money and a horse are given in exchange for another horse *warranted sound*, which was unsound at the time, an action for money had and received, is not a proper action to try the warranty, nor will trover lie for the horse given in exchange, because the property is altered."

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 279.

E. S. WHEELER & CO.,
Plaintiffs in Error,

vs.

THE NEW BRUNSWICK AND CANADA RAILROAD COMPANY.

BRIEF OF DEFENDANT IN ERROR.

C. R. INGERSOLL,
JOHN W. ALLING,
Of Counsel.

NOTE.

This brief fully answers each assignment of error, and is therefore lengthy.

Some of the assignments, though ingenious, in their form, are realy fallacious, and of no special account.

The real questions are:

1. Was the contract of Jan. 31st binding when made?

This is discussed on Pages 4–18.

2. What was the character of the communicated resolution of Feb. 16, 1880?

This is discussed on Pages 38–46.

3. If that resolution was repudiatory, did it have any effect on the contract, of Jan. 31, in view of the position taken by the defendants in their letter of Feb. 28.

This is discussed on Pages 46–57.

4. Did the Court err in regard to the damages, for 600 tons, on the Second Count.

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Upon the facts found by the Circuit Court the plaintiff below had judgment.

The question here is, whether upon those facts, in view of the errors assigned, that judgment was correct in whole, or in part.

I.

Those facts amount to this:

A sells to B, and B buys of A, a certain number of tons of old iron, to be delivered on or before a future day, for a certain price per ton, to be paid on such future delivery, and the contract is reduced to writing and signed by A and B.

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A sells to B, and B buys of A, a certain number of tons of old iron, to be delivered on or before a future day, for a certain price per ton, to be paid on such future delivery, and the contract is reduced to writing and signed by A and B.

At the time of making the contract A and B had each

"in his mind," the ton of usage—*i. e.*: the ton of 2240 lbs.—though the written contract contained the word "tons" only.

By the Statutes of all the Countries, where the contract was made or to be performed, or where the iron was, the "ton" was 2000 lbs.

After the written contract was made and delivered, A writes to B, with no intent, however, "to repudiate or abandon the contract," that the "ton" mentioned therein is a ton of 2000 lbs., with a view to draw from B, "a modification of said contract."

B at once replies, that he does not understand the letter to have been written with a view of "modifying the sale in any of its terms," that by commercial usage, the term "ton," means 2240 lbs.; that the contract is obligatory upon A, according to its terms, and that under such contract he "looks" to A for its performance, "within the dates named in the contract," by the delivery by A to B, of the old iron, in tons of 2240 lbs.

Within the dates named in the contract, A offers to deliver the old iron to B, in tons of 2240 lbs., and B refuses to receive it.

The ostensible ground of refusal, was that there had never been any contract.

The real ground was, that the market price of old iron had fallen considerably below the contract price.

II.

By such refusal, the plaintiff suffered large damages.

It wished, in Jan., 1880, to make available its old rails, at the best rates then to be had, for future delivery, in order to assist in paying for steel rails.

The plaintiff recognized the possibility that the market rate for the old iron would decline. The later delivery is $2 per ton less than the earlier.

The plaintiff had the right to take advantage of the price ruling at the time of the sale, for the commodity it had to sell.

The plaintiff was not a speculator in old iron.

It had so much on hand, and it sold what it had, to the defendants, for a certain price.

At no time, did the defendants permit the plaintiff to make any other disposition of the iron.

The plaintiff did not want to make any other disposition of it, and could not have done so, had it wanted to do so.

The iron was sold. Nothing remained to be done, but to deliver it.

They held it for delivery to the defendants, and within the period for delivery, offered it to the defendants.

Clearly, if the defendants are not held liable for refusing to receive and pay for the iron, the plaintiff has lost the benefit of the prices, ruling in the market, when it went into the market to sell the iron; a benefit to which it was justly and honestly entitled, and which it endeavored to secure, by its contract with the defendants.

III.

We come then to the discussion of the assigned errors, in their order, to see if the Court mistook the law with reference thereto.

FIRST ERROR.

"That upon the facts found, and upon the evidence in "the case, the said James Murchie had no legal authority "from the plaintiff, to bind it finally, by the contract pur "porting to be evidenced, by the Exhibits 1 and 2, and the "same did not become a contract, if at all, until adopted "or ratified by the plaintiff."

(1.) In so far, as this assignment of error is based upon the "evidence in the case," the assignment is bad.

(*a.*) This Court, on writ of error, does not revise conclusions of fact, from evidence.

The finding of facts, made by the Circuit Court, is as conclusive as a special verdict.

(*b.*) The finding does not purport to set out any evidence, simply as such.

Only such evidence is reported, as explains certain rulings of the Court, all of which were in favor of the defendants, except with regard to the question and answer, No. 9, (Page 18,) the ruling as to which was so clearly right, as not to be assigned for error.

For instance; the list annexed to the finding, (No. 6) explains a ruling in favor of the defendants.

The plaintiff claimed, that the difference between the contract and market price, at the time of the tender of the one thousand tons of old rails, admitted by the answer (Page 9) to have been $15 per ton, furnished the rule of damages, whereas the Court took such difference of prices, substantially as it was Aug. 1st, the date up to which the 1,000 tons could have been delivered, as the rule of damages.

At that time the difference was $11 per ton, making the plaintiff's damage $11,000, instead of $15,000.

Concerning the lot of 600 tons, it made no difference at which of the respective periods, the difference between the contract and market prices, was taken.

(2.) Did James Murchie have "legal authority from the plaintiff to bind it finally by the contract" of Jan. 31st?

(*a.*) The facts and conclusions of the Circuit Court, on this point, are as follows:

"At the time of the transactions hereinafter mentioned, "the corporation had eight directors, who owned nearly "all of the capital stock of the company.

"At the organization of the company, a few years ago, "there were but eight owners.

"*The business of said directors, was transacted very often "without the formality of votes, but by verbal instructions to "the President, and more after the manner of a partnership "than of a corporation.*

"In 1878, the directors commenced to relay the road "with new steel rails, and one thousand tons were bought "for that purpose.

"On July 24, 1879, the directors passed the following "vote: 'Resolved that the president be authorized to pur- "chase 2,000 tons of steel rails, if he deems it advisable to "do so.'

"Negotiations for this purpose were thereafter com- "menced, which resulted in a contract, executed about "Febuary 6th or 7th, 1880, with an English firm, for the "purchase of that amount of steel rails.

"They were to arrive some time thereafter.

"As reliance was placed upon the money to be obtained "from the sale of the old rails, for the payment of the new, "the directors of the corporation, in conversations, and by "verbal instructions, given from time to time, before the

"completion of said contract, both at directors' meetings,
"and at occasional interviews elsewhere, but not by vote,
"passed at any meeting, verbally authorized and instructed
"their president, to sell the old rails, belonging to said com-
"pany and then upon the road bed, and *gave him full au-*
"*thority to do whatever was necessary for that purpose.*

"When Mr. James Murchie, the vice-president of said
"company, was about to leave St. Stephen for New York,
"and eastern cities, in January 1880, upon business of his
"own, the president gave him express instructions, to sell
"said old rails, the approximate weight of which was well
"understood, for 75 tons of old rail, would be taken up, by
"the laying 100 tons of new rails, and *in pursuance of said*
"*instructions*, said Murchie, as vice-president of the com-
"pany, entered, at New Haven, Jan. 31, 1880, into the
"written contract with the defendants, for the sale of 1000
"tons, and also for the sale of 200 to 600 tons, which con-
"tract is contained in plaintiffs Ex. 1 and 2, hereto annexed."

Record, Pages 14 and 15.

Which Exhibits are,

"New Haven, Jan'y 31, 1880.

"James Murchie, Esq., V. Pres't, N. Brunswick and
"Canada R. R.

"DEAR SIR:

"We have this day bought of you, as rep-
"resentative of the New Brunswick and Canada R. R. Co.,

"one thousand tons old rails, for delivery in New York or "New Haven, (at our option) at $30, without duty, and "delivery to be before Aug. 1st, and also two (2) to six hun- "dred tons for delivery between Aug. 1st and October 1st "at $28, without duty.

"Terms in each case, cash against invoice, B. L. and "Insurance policy in satisfactory company.

Yours Resp'y

E. S. WHEELER & CO.

"New Haven, Jan'y 31, '80.

"E. S. Wheeler & Co., New Haven.

"We hereby accept your order "of this date, and will deliver rails at price, and on terms "named.

"Resp'y,

"NEW BRUNSWICK & CANADA R. R. CO.,

JAMES MURCHIE, V. Pres.

Pages 20 and 21.

"The conclusions to which I have come, from the fore- "going facts are:

"1st. That the president of the company, was fully au- "thorized to take all steps, necessary to sell the iron rails, "although the authority was not conferred by vote of "stockholders or directors.

"That this power to sell, was not limited to his personal

"action, but that he was also fully authorized to employ "substitutes or agents, and that James Murchie was duly "authorized to make the contract of Jan. 31st, 1880.

"No confirmation of the contract was needed."

Record, Pages 18 and 19.

* * * * * * *

(*b.*) Two questions are raised.

Could the president have been authorized to make this sale, except by vote of stockholders or directors?

Was the authority limited to his personal action?

(*c.*) The first point received the thorough consideration of the Supreme Court of Mass., in Melledge *vs.* The Boston Iron Co., 5 Cush., 158, 178. That Court say:

"As to the authority, it requires some further considera- "tion. Undoubtedly to charge a party by the act of an "agent, *and corporations can be charged in no other way*, it is "incumbent on the plaintiff to prove the authority of the "agent.

"But how is such authority to be proved?

"No doubt the vote of the corporation entered on their "records or minutes, is the regular and proper evidence;

"but suppose they *pass no votes*, or keep no records, or re-
"fuse to produce them, and yet *de facto*, transact a large
"amount of business.

"If the authority of agents could be proved in no other
"way, than by the production of such a vote, those who
"deal with them would have but a precarious security for
"their rights.

"*When a corporation consists of a small number of persons,*
"*like a partnership, they may transact all their business by con-*
"*versation, without formal votes; and it would be a violation*
"*of the plainest principles of justice, to hold those who deal*
"*with them, to prove all their acts, by written votes, which*
"*they do not keep, or do not produce.*"

"If this were not so, it would lead to very great injus-
"tice, for it is notorious that the transaction of the ordi-
"nary business of railways, banks, and similar corporations
"in this country, is without any formal meetings or votes
"of the board of directors.

"Hence there follows a necessity of giving effect to the
"acts of such corporations, according to the mode in which
"they chose to allow them to be transacted."

Redfield, C. J., in
Bank of Middlebury *vs.* Rutland R. Co.,
30 Vt., 159, 170.

Northern Central R. Co. *vs.* Bastian, 15 Md., 494, 501.
Angell on Corporations, *ss.*, 281–284–291.
Pierce on Railroads, 373, 1st Ed.
Martin *vs.* Webb, 110 U. S., 7.
Mining Co. *vs.* Bank, 104 U. S., 192.

The keeping of the road bed in good order, by the substituting of new steel for old iron rails, was part of the ordinary business of the plaintiff, and required no vote of the stockholders, and besides the directors constituted nearly all the stockholders.

Hoyt *vs.* Thompson's Executors, 19 N. Y., 217.

(*d.*) Was the authority of the president, to sell, limited to his personal action?

(1.) We say that the conclusion of the Circuit Court, that such authority was not limited to the personal action of the president, was a conclusion of fact, and cannot be reviewed in this Court.

His authority was to sell, and to do whatever was necessary for that purpose.

What was the character of the authority, as being personal or not, was a conclusion of fact; it may be of a fact,

from other facts, but none the less, the function of the Court, was a finding of *fact*, and not the decision of a question of *law*.

(2.) Such conclusion, with its result, that James Murchie had authority to sell the rails, while acting under the express instructions of the president, is reasonable and just.

The president was authorized to purchase 2000 tons of steel rails, if *he* deemed advisable. He was negotiating, for the purchase of that amount of steel rails The old rails were to be sold to raise money to pay for the new. He was authorized to sell the old rails, and to do whatever was necessary for that purpose.

A sale of that amount of old iron, could better be made in the larger markets of New York and vicinity, (and New Haven is but a part of the New York market—Ex. 6) than at St. Stephen.

But the management of the road required the constant supervision of the president, and he might not be able to go to New York.

Moreover, it would not be presumed, that the president was charged with the duty of personal negotiation with the purchaser.

He was not a broker or dealer in old iron.

It was not a case, where there was a great uncertainty, about the market price of the commodity to be sold.

Old iron then and at all times, had a certain market value.

The point would be to find a purchaser.

Had it not been for the opportune visit of Murchie to the eastern cities, the president would have been obliged to employ, by correspondence a broker, probably in New York, to make the sale.

"If Mr. Magraw" (Prest. of the R. Co.) "was empow-"ered to effect the sale of the iron," (800 tons of old rails) "then it was competent for him to engage the services of "the plaintiff" (a broker), "to act in finding a purchaser "and bringing about a sale. Such an act, in the absence "of proof to the contrary, was within the scope of his "agency as a reasonable and proper means of accomplish-"ing the business intrusted to his charge."

Northern Central R. Co. *vs.* Bastian, 15 Md., 501.

Moreover the very act of the president, in giving express instructions to the Vice-President, to sell the old rails, acquainted as both of them were, with the discussions and resolution of their fellow directors, concerning the sale, shows by this cotemporaneous and practical interpretation

of the power, that it was not understood, to have been personal in all its details, with the president.

So the act of Murchie, in making "an absolute and final unconditional sale," shows that he regarded himself, *then*, as having power to bind the company.

"Such declarations and statements of agents, made in connection with their dealings are *res gestae*."

Melledge *vs.* Boston Iron Co., 5 Cush., 179.

"*Contemporanea expositio est optima et fortissima in lege*."

This duty of selling the old rails, was cast upon the president, as the chief executive officer of the road, to be attended to, not personally, in the sense he was to make personally the negotiations with the purchaser, but in the sense, in which the general business of the road, was conducted by him—through the aid of agents and substitutes.

The directors gave him *full authority to do whatever he found necessary, for the purpose of selling the rails.*

They did not undertake to prescribe that he should *personally*, do everything.

The resolution having been reached, that the old rails should be sold, the entire power of the corporation, to make the sale, was vested in the president, to be exercised by him in whatever way he deemed necessary for the in-

terests of the company, and under that power he deemed it advisable and necessary to authorize Murchie, and therefore did authorize Murchie, to make such sale, and he in the name of the company made the sale.

(3.) The claim that Mr. Murchie had no legal authority from the plaintiff, to bind it finally by the contract of Jan. 31, is not open to the defendants under the pleadings.

The complaint averred, in paragraph 2, of the first and third counts, (Pages 3 and 5) that the plaintiff and defendants executed and delivered the written contract (Ex. 1 and 2.)

The Practice Act of Connecticut, (Acts of 1879) and the rules established by the Supreme Court of that State, in pursuance of said Act, on Page 16, Sec. 4, provide:

"Every material allegation, in any pleading, which is "not denied by the adverse party, shall be deemed to be "admitted, unless he avers, that he has not any knowledge "or information thereof, sufficient to form a belief."

This act and these rules controlled the pleadings, in this action at law, in the Circuit Court.

Now what did the defendants reply to the averment, that the plaintiff and defendant executed and delivered the writings Ex. 1 and 2.

They said, in Paragraphs 2, Pages 8 and 10;

"The defendants admit, that on said 31st of January, "negotiations were had between the defendants and one "James Murchie, who purported to act as vice-president "and the agent of the plaintiff, which negotiations term- "inated in written instruments, executed by the defendants, "and by the said Murchie, acting as the agent of said plain- "tiff," &c.

Here is no denial, but a sort of admission that the writings were executed and delivered by the plaintiff and defendant; no denial of Murchie's agency; no averment of no knowledge or information on that subject, sufficient to form a belief; and under the rules, the execution and delivery of the written contracts, *by the plaintiff and defendant*, not being denied *absolutely or qualifiedly*, are admitted.

This is no unfair view of the answer.

It proceeds to say, that the written instruments set forth the *mutual* agreement of the *parties*.

It avers, that the plaintiff subsequently repudiated the contracts of Jan. 31st, and on account of such repudiation,

the defendants suffered $5,000 and $3,000 damages, which by way of counter claim, they seek to recover in this action.

A contract must have *existed*, if it has been repudiated, so as to thereby constitute a cause of action against the repudiator.

These counter claims are withdrawn, only in the contingency that the "ton" of the written contract is 2,000 lbs.

Manifestly if this is so, the counter claims never had the shadow of a leg to stand upon.

Moreover the question of the agency of Mr. Murchie, upon the facts disclosed in the record, cannot be raised by the defendants in view of their letter of Feb. 28.

In that letter they hold the railroad company to the contract which Murchie, acting as agent of the company, had made.

When such performance was tendered, they must be held to be estopped from questioning the agency.

SECOND ERROR.

"That upon the facts as found, and under the pleadings "in the case, there was no such meeting of the minds of "the parties as to make the contract, purporting to be "evidenced by the plaintiff's Ex. 1 and 2, a binding one "between them."

(1.) So far as the pleadings are concerned, *both* parties in complaint and counter-claim, set up the "written instruments" Ex. 1 and 2 as binding, and each seeks from the other damages, for the alleged breach thereof.

(2.) The defendants contend, that the first paragraphs of the replications, pages 11 and 12, establish by way of facts, admitted by the pleadings, the non-meeting of the minds of the parties.

Those paragraphs are—

"The plaintiff denies that the written instruments re- "ferred to in the second paragraph of the answer, called "for a ton of 2,240 lbs., the expression in said instruments, "being the word 'tons,' and nothing more."

This claim of the defendants is absurd.

The complaint alleged that the plaintiff and defendants

mutually agreed, by written instruments, duly executed and delivered, for the sale and purchase of 1000 "tons" of iron rails, (page 3.)

The answer averred, that the "written instruments" set forth an agreement, for the sale and purchase of 1000 tons, of *twenty-two hundred and forty pounds each*, of such rails.

The replication denies that the "written instruments." set forth or "called for a ton of 2,240 lbs., the expression "in said instruments being the word 'tons,' and nothing "more."

The rejoinder, by not denying, admits that the written instruments use the word "ton," and nothing more.

The only relevant averment of *fact*, made and admitted by the pleadings, is, that in the written instruments, the word "ton" only is used.

The defendants unnecessarily aver in the answer, their legal claim, that the "ton" of the *writing*, and apart from custom and usage, or prior understandings, is 2,240 lbs. and the plaintiff unnecesserily denies such legal claim, but sets out the exact and decisive word of the written instruments.

But the pleadings, on both sides, disclose no *facts* whatever, showing any misunderstanding of the parties as to the *terms* used in the written contracts, and disclose no

fact why such written contract is not binding upon the parties, according to the true legal interpretation of its terms.

Hence it is entirely clear, that no failure of the minds of the parties to meet, is disclosed on the pleadings.

It should be said, in explanation of the fact, that all the pleadings, after the complaint, appeared to have been filed the same day, that they had been drawn and exchanged in their due order, between counsel, long before, and were in fact, all filed, when the trial began.

Probably the defendants were ignorant, when the answer was made, of the statutory definition of the word "ton."

(3.) "That upon the *facts* as found, there was no such "meeting of the minds of the parties, as to make the con- "tract Ex. 1 and 2, binding," remains to be considered.

Subject to the plaintiff's objection, and exception, that custom and usage could not control the statutory definition of the "ton," and that the mental conception of each party, "in his mind" of the meaning of the word "ton," could not be inquired into, in order to ascertain its legal meaning: the facts on this point are.

"On Jan. 31st., 1880, and when the contractof that date was entered into, by and between the said Murchie, acting in behalf of and as agent of said company, and E. S. Wheeler, one of the defendants, and acting for said firm, each of said parties, contracted for the sale and purchase of gross tons, in accordance with said custom, and each understood, that he was contracting for tons of the customary weight, that is 2,240 pounds each, and each knew that the word "tons," as used in said contract, meant, in his mind, tons of 2,240 pounds each, and there was no misunderstanding, between said persons, as to the true intent and meaning of said contract." Page 17.

This finding, disposes of the question, very effectually, as to whether the minds of the parties actually met, on the sale of the old rails.

Their minds also met, on the *terms* of the writing, by which their contract was to be evidenced.

Indeed the language of Ex. 1, which alone contains the terms of the sale, and uses the word "tons," is the *language of the defendants.* It is their paper, bearing their signature, and presumably in their handwriting, although that fact does not appear of record.

Performance by the plaintiff, was also by tender of tons of 2,240 pounds each.

Whatever might have been the true legal interpretation of the word "tons" in Ex. 1 ; whatever consequences might have flowed from the omission of the defendants, owing to their ignorance of a statutory ton, to write "gross tons," instead of "tons" in Ex. 1 ; when the time for performance came, the plaintiff *met and agreed* to the defendants claim, that the ton of the contract should be 2,240 pounds.

So that at the time when the contract was made; at the time when it was reduced to writing, and at the time when it was to be performed, embracing all the essential periods of any contract, the minds of the parties exactly met.

"The second objection is, that there was a misunderstand-
'ing, between the parties, as to the principal matter of the
'agreement, so that there was not such a union of minds,
"as is necessary, to constitute a binding agreement.

"This misunderstanding however is not sufficiently "proved.

"All that appears is that the parties *after* the agreement "was made, put a different construction on it, an occur-"ance by no means uncommon.

"It would be a most dangerous doctrine, to hold that a "party might release himself from the obligation of a con-"tract, by declaring that he understood it, in a different "sense from its true construction.

"Upon the whole, it appears to the court, that a mere "misunderstanding, as to the construction of the terms of "the contract, the same being fairly made, and the misun- "derstanding being unknown at the time, is no sufficient "reason for annulling the contract."

Miller *vs.* Lord, 11 Pick., 10–24–26.

THIRD ERROR.

"That the meaning of the word 'tons' in said Ex. 1 and "2 was material and continued, and remained material up "to and after June 14th and Aug. 10th, respectively, and "did not on those dates respectively, become immaterial "by reason of any consent or admission of the plaintiff "then made."

(1.) It is not easy to understand, what is meant by this assignment.

A written contract had been made for the sale and purchase, on future delivery, of so many tons of old rails.

When "within the dates named in the contract," the seller brought to the purchasers' door, tons of 2,240 lbs., as the tons called for by the contract, and asked the purchasers to take them, what had the purchasers further to say?

Suppose they had taken them and paid the contract price, would not the transaction have been forever closed?

The tender of delivery was, on the part of the seller, the equivalent of actual delivery.

The tender of delivery, was exactly as the purchasers had demanded and insisted should be made, by their letter of Feb. 28, 1880, (page 21.)

(2.) It may be argued that the written tenders of June

14 and Aug. 10 were without waiver of rights, and so that the meaning of the word "ton" continued material.

(*a.*) But on June 10, 1880, a simple business-like tender, with no clause of without waiver, &c., was made of the rails, to the defendants, which was declined.

"No other communication, verbal or written, passed "between the plaintiff and defendants, until about June "10th, 1880, when Mr. Murchie called upon the defendants, "and asked them whether they would have those rails "delivered in New Haven or New York, and said that the "plaintiff was ready to deliver them, and that the tons "were to be 2,240 pounds each.

"The defendants declined to receive any rails, upon the "ground that the plaintiff had repudiated the contract of "Jan. 31st, or that it had ceased to exist by the plaintiff's "act." Page 15.

No other tender was really necessary. It was only desirable, in order to induce the purchasers to take the rails, if they would, and to make sure that the plaintiff had done all it could, towards performance on its part.

(*b.*) But the clauses, "without waiver," &c., in the written tenders of June 14 and Aug. 10, left no question

open for the *defendants*, about the meaning of the word "tons," after those dates.

Those writings state that the defendants, in their letter of Feb. 28, construe the contract of Jan. 31st as meaning that the ton of rails, specified in that contract, is 2,240 lbs.

Now without waiver of our rights, but to avoid dispute, we tender you the delivery of *the* thousand tons, and of *the* six hundred tons called for by that contract, at gross weight of 2,240 lbs. to the ton.

Will you take it? If you do, it avoids all dispute, and the matter is at an end.

If you do not, we waive no "*right*" which we may have.

If it be the law of that contract, that the ton therein mentioned is 2,000 lbs., and you still claim that the communicated resolution of Feb. 16, 1880, had brought about, as you told Murchie the other day, contrary to the intentions of its framers, a repudiation or cessation of the contract of Jan. 31st, we have the right, if it becomes material to us in reply, to claim the true legal interpretation of the contract.

But in the *performance* of that contract, on our part, we tender you, in accordance with your demand, the number of tons called for by the contract, at the gross weight of 2,240 lbs., to the ton.

Further, "on June 30, 1880, the plaintiff tendered in *fact*,

"under the contract of January 31, 1880, to the defendants, "a cargo of old iron rails, of about sixty-five tons, of 2,240 "lbs. to the ton, at the city of New Haven, and the defend- "ants declined to receive the same, or to say where they "should be delivered, whether at New Haven or New "York, or to give any instructions whatever on the sub- "ject."

Page 16.

After we had offered and tendered performance of the contract, as the defendants, in their letter of Feb. 28, had demanded, all the time from June 10 to Aug. 10, actually sending to the defendants, a certain number of tons of old rails, in weight of 2,240 lbs. to the ton, as so many contract tons; after we had done all we possibly could to meet and satisfy the defendant's demand, that the ton to be delivered, should be a ton of 2,240 lbs., what possible materiality could continue to exist, for the defendants, whether the contract ton was 2,000 or 2,240 lbs.

(3.) The reasons which the defendants gave, for their refusal to receive the iron, clearly shows the absurdity of this assignment of error.

Those reasons as stated to Murchie, were that the contract of Jan. 31st had been repudiated by the plaintiff, or

as stated in the replies to the written tenders, that there had never been any written contract.

They constitute now the defense of the defendants, as made in Court.

Now if the contract had ceased to exist, by repudiation or otherwise, that event must have happened before June 10.

For if the contract was then alive, there is no defense.

But *if* it had *ceased to exist* before June 10, or there had *never* been any contract, how on June 10 or afterwards, did it become or remain material to the defendants, except as a moot question, whether the ton of the writing was 2,000 or 2,240 lbs.?

FOURTH ERROR.

"That neither of the Statutes of Connecticut, or of New "York, or of Maine, or of the Dominion of Canada, could "legally measure or fix the quantity of pounds to the ton, "as that word was used in Exhibits 1 and 2, at 2,000 lbs. to "the ton."

(1.) There was no ruling, that such Statutes could so legally measure or fix the quantity of pounds to the ton.

The ruling of the Court on this subject was very explicit, and was:

"That the questions, whether parol evidence was admissible to explain the meaning of the word "ton," as used in the contract of Jan. 31st, 1880, in view of the Statutes hereinbefore specified, or whether parol evidence was admissible to alter or vary the meaning of the word, from that given in said Statutes or either of them, are IMMATERIAL, inasmuch as the plaintiff by its conduct, in tendering tons of 2,240 lbs. each, and by its letters of June 14th, and Aug. 10th, agreed for the purpose of avoiding dispute, to the defendants' construction of the contract, and in fact, admitted, that the contract should be taken to mean gross tons."

Record, Page 19.

It is true, that in the formal certificate of the Court, to the bill of exceptions, the Court states that each and all of the defendants' said claims were overruled, but this can only mean, that they were overruled in the manner, and for the reasons stated in the record.

To claim otherwise would be an attempt, to take a fraudulent advantage of the formal certificate.

This particular claim of the defendants was overruled by the Conrt, as the record clearly shows, by holding that the claim was immaterial.

If any error could have been assigned, on this subject matter of the case, it could only have been that the defendants claimed that it was material and essential, that the Court should have decided that such Statutes could not fix the "ton" of the writing of Jan. 31st at 2,000 lbs., and that the Court made no decision on the subject.

But the record does not show that the defendants *in fact*, complained of the *actual disposition* which the Court made of this subject matter of the case.

The evidence on this subject was offered by the defendants, and admitted, against the plaintiffs' objection and exception, and the finding of the mental conception of the word "ton," by Murchie and Wheeler, "each in his mind," was in favor of the defendants.

This assignment of error is therefore bad on the face of the record, as there was no such ruling, as is assumed therein.

(2.) The ruling of the Court, that, upon the facts of this case, it was entirely immaterial, whether the contract "ton" was 2,000 lbs. or 2,240 lbs., is clearly correct, for the reasons stated in the record.

Even the defendants take no exception to this ruling.

(3.) But if parol evidence of custom and usage, and of the separate mental conceptions of Murchie and Wheeler, as to the meaning of the word ton was inadmissible, if the ton of the writing of Jan. 31st was legally, 2,000 lbs, then, the communicated resolution of Feb. 16, 1880, was but the correct re-statement, of the contract of Jan. 31st, according to its true interpretation, and if this be so, all the claims of the defense vanish.

Affirmance by the plaintiff, of the contract of Jan'y 31st, according to its true interpretation, puts an end to all questions, about the authority of Mr. Murchie; makes the contract of January 31st, absolutely obligatory upon the plaintiff, and leaves for the defendants, only to say, that the plaintiff, while legally bound to deliver only 2,000 lbs. to the ton, offered to deliver 2,240 lbs. to the ton.

While therefore, it is not essential to the plaintiff's case, we will state the reasons why we claim that the parol evidence was inadmissible, and that the ton of the contract of Jan. 31, was by true construction 2,000 lbs.

(4.) (*a.*) By the statutes of all the countries, where the iron rails were at the time of the sale, or where the contract was made, or was to be performed, the ton was 2,000 lbs.

These statutes were passed for the very purpose of providing for *fixed* weights and measures; for the very purpose of determining what a "ton" should mean, when the parties had used that word and nothing more; for the very purpose of preventing litigation, about whether the word "ton" *of itself* meant the long or short ton, the gross or net ton.

(*b.*) No question can be made but that the several States of the United States have the constitutional power to pass statutes concerning weights and measures, and prescrbing what a "ton" shall be taken to mean, in all contracts made and to be performed within their jurisdiction.

Weaver *vs.* Fegely, 29 Pa. St., 27.

If Congress, by virtue of its authority to regulate commerce, has any power to make laws on the same subject of weights and measures, it is well settled that the State laws are binding and operative, until superseded by an Act of Congress. and no such Act has been passed.

Weaver *vs.* Fegely, 29 Pa. St., 27.

Sect. 2,952, of the Act concerning the *Collection of Duties*, simply provides, that whenever the word "ton" is used in *that chapter*, in reference to weight, it shall be construed as meaning 2,240 lbs.

In other words when the question is how much will eight dollars pay duty for on old iron, the answer is 2,240 lbs.

(*c.*) The statutory definition of the "ton" is conclusive, and all the parol evidence, to show a different meaning was inadmissible.

Evans *vs.* Myers, 25 Pa. St., 114.

Weaver *vs.* Fegely, 29 Pa. St., 27.

"Thus if a word denoting weight, measure or number, "has had a definite meaning attached to it by the Legisla-"ture, parties using that word in a written contract will "be *conclusively* presumed to have used it in such sense, "unless the contrary appears from some part of the writing "itself."

Vol. 2, Taylor on Ev., §. 1,064.

"But where words have a known legal meaning, such "for example, as measures of quantity, fixed by statute, "*parol evidence*, that the parties intended to use them in a "sense, different from the legal meaning, though it were still the *customary and popular sense*, is not admissible."

1st Greenl. on Ev., §. 280.
Redfield's Edition.

"But the question here is whether, when a person is sell- "ing butter, under the specific denomination of a pound, he "shall be compellable to sell more than a pound.

"How can a person, who professes to sell a pound of "butter, be compellable to sell more than a pound? I am "of the opinion that the custom cannot be supported."

Noble *vs.* Durell, 3 D. and E., (T. R.,) 271.

Vide also,

Hockin *vs.* Cooke, 4 D. and E., (T. R.,) 314.
Master of St. Cross *vs.* Walden, 6 D. and E., (T. R.,) 338.
Smith *vs.* Wilson, 3 B. and Ad., 728.

There is nothing in the case of Miller *vs.* Stevens, 100 Mass., 518, which conflicts herewith.

There, parol evidence was admitted to show that the parties understood by "barrels" a certain kind of a vessel, and did not use the word, as a unit of measure, and therefore not in its statutory sense.

The word "ton" denotes quantity only. There is no *vessel* called "ton."

(*d.*) The defendants contend, that however these statutes may control transactions, made and to be carried out within the borders of a State, they do not exclude evidence of custom and usage, in commercial transactions, where goods are bought from foreign countries.

But it is universally held, that either the law of the place where the contract was made, or where it was to be performed, governs its construction; and though it is immaterial which State, yet Connecticut was the true place of performance.

Now what is there, in the nature of the commercial transaction of buying in New Haven, goods to be delivered there, from New Brunswick, different from buying in New Haven, goods to be delivered there, from other parts of the State, or from other States.

The quantity of goods bought in Connecticut, to be delivered there, from other States and Countries, is very great, and no doubt equals the quantity of goods, in the State, bought and to be delivered there.

What reason can be assigned, why the statute concerning weights and measures, does not concern both sets of transactions.

The design of the statute, was to have the same weight for *all* buyers and sellers, and that the Courts of the State should have *one and a uniform* rule, concerning weights and measures.

Why are not the transactions, where goods are bought in Connecticut or New York, to be delivered there from other States or Countries, as liable to come under the jurisdiction of the Courts of those States, as more strictly domestic transactions?

Why is it not desirable, to have one and the same rule govern both classes of cases?

Can it be so that a citizen of Connecticut, buying in New Haven, iron rails by the ton, to be delivered there from Hartford, by *railroad*, is presumed to have a different ton in mind, than when he buys iron rails by the ton, in New Haven, to be delivered there by *ship*, from Hartford, or to be delivered there by railroad, from Calais, Me., or to be delivered there, by ship or rail, from St. Stephen, just across the St. Croix River.

(*e.*) With the wisdom of these statutes, with the singular fact that the statutory ton, in the commercial States of New York and Connecticut, differs from the customary

ton, this Court has nothing to do, as no question, affecting this case, is raised thereby.

Certain it is, that the defendants can not and do not complain of such difference, because there was *tendered them the full customary ton.*

FIFTH ERROR.

"That the vote of the directors of the plaintiff corpora-
"tion, of February 16th, 1880, and the letter of Mr. Murchie
"to the defendants, accompanying the same, was a repu-
"diation of the contract, purporting to be evidenced by
"the Exhibits 1 and 2."

(1.) By the word "repudiation," can only be meant, a notice by one party to a contract, to the other, that the former will not perform it.

Anything short of this, whatever it may be, is not repudiation.

(2.) So far as the intent of the plaintiff to repudiate, or not repudiate, the record is clear and explicit.

"The plaintiff did not intend by its votes, February 16th,
"or by the letter of February 17th, to repudiate or abandon
"the contract of Jan. 31.

"It did attempt by said votes, to draw from the defend-
"ants, a modification of said contract."

Record, Page 18.

"Neither the votes of February 16, nor the letter of Mr.
"Murchie, of Feb. 17, 1880, can fairly be considered a re-
"pudiation of the contract, or an attempt to abandon it.

"*The directors did not intend, or want to repudiate or aban-*
"*don, and no confirmation of the contract was needed.*

Record, Page 19.

(3.) The votes disclose no intention to repudiate, and on the contrary, are very clearly confirmatory of the contract.

There were two resolutions.

(*a.*) The first was:

"*Resolved:* That the contract made by Mr. Murchie,
"with Messrs. E. S. Wheeler & Co., of New Haven, be
"agreed to, a memo. to this effect to be furnished to Mr.
"Murchie, to forward to Messrs. Wheeler & Co."

Record, Page 15.

Here was clearly an absolute confirmation of the contract, if it needed one.

This vote is not part of the succeeding one. Other business came between.

This vote is to be interpreted, precisely as if Wheeler & Co. were enforcing the contract and seeking for proof of the binding character of the contract, upon the Railroad Company.

Unquestionably it would be ruled that the contract of Jan. 31st, made in the name of the Railroad Co., by Murchie,

having been "agreed to" by all the directors, was recognized as binding, and was binding upon the Railroad Company.

(*b.*) The second resolution was:

"*Resolved:* That the following sale of old rails, made by "Mr. Jas. Murchie, to Messrs. E. S. Wheeler & Co., be "confirmed.

"Sold Messrs. E. S. Wheeler & Co., one thonsand tons "of old rails, for delivery in New York or New Haven, "at their option, before Aug. the 1st, next, at $30 (thirty "dollars) per ton, of 2,000 lbs., the duty to be paid by "Wheeler & Co., and also two hundred to six hundred "for delivery in New York or New Haven, between Aug. "1st and October 1st, at twenty-eight dollars ($28) per "ton of 2,000 lbs., the duty to be paid by Wheeler & Co.

"In each case cash against invoice bill of lading, insur- "ance policy in satisfactory company."

It is simply impossible to look upon this resolution as repudiatory.

There is not an intimation of notice, that the plaintiff will not perform the contract, made on its account by Murchie.

The first sentence, explicitly states that the "*sale of old rails made by Mr. James Murchie, to Messers. E. S. Wheeler & Co., be confirmed,*" and then the resolution proceeds to state, how the plaintiff understands the sale.

The original contract, with reference to price per ton, the time for performance, as to who should pay the duty, and whether the Railroad Co. sold the iron, while unambiguous in fact, was in some particulars, not so distinctly expressed, as the directors thought desirable.

Therefore, the original (Ex. 2) "we hereby accept your *order*," becomes "sold Messrs. E. S. Wheeler & Co.," and corresponding to "we have bought of you," of Ex. 1.

The phrase "at $30" in Ex. 1. is enlarged to "at $30 (thirty dollars) per ton" and the "without duty" of the original, to "the duty to be paid by Wheeler & Co." and the "Aug. 1st" to "Aug. 1st *next*," and "B. L." becomes "bill of lading."

In these particulars, the changes are undoubtedly in the spirit of confirming the contract, which Murchie had made on account of the Railroad Co., and of re-stating it, so as to avoid any misunderstanding as to its meaning.

It should be presumed, that substantially the same idea was in mind, when to the words "thirty dollars per ton" are added the words "of 2,000 lbs."

In every other change from the literal expression of the original papers, it is clear that the directors were right, and that their object was to state how they understood the thing, which Murchie had done.

If the "ton" of the writings of Jan. 31st, was in law 2,000 lbs, or if the directors had reasonable ground, to believe, that in law, the word "ton" would be so construed, why

is it not a just and reasonable interpretation of this resolution, to say that they had the *same* object in view, of stating how they understood the thing, which Murchie had done for the company, on *this* point, as in regard to the *other* changes.

(*c.*) Certainly, this is the view, which in the day and time of it, the defendants took of this resolution.

They did not understand it to be of a repudiatory character.

"We do not understand further that this resolution was forwarded to us, with a view of in any way, modifying that sale in any of its terms."

Record Page 22.

The defendants understood, that the sale with all its *terms*, as reduced to writing, with Murchie, was to stand as the act of the company.

They did not understand that what Murchie had done, needed confirmation, as it did not.

They understood, that in some unaccountable way, the plaintiff had got hold, of what seemed to the defendants, a wrong meaning of the word "ton," and they take great pains, to explain to the plaintiff, why its construction of that word is erroneous.

But the resolution is not received or understood to be, a notice by the plaintiff, that it would not perform the contract, as made by Murchie.

The discussion is at once narrowed down, to the setting forth of the views of the parties, as to the meaning of the word ton, and there is no hint of a denial of the obligatory character of the contract, according to its true meaning, and so confident is Mr. Wheeler of his own idea, as to its true meaning and of his reasons for it, that he believes he has convinced the other party, of its error in the matter.

(4.) Of course the claim, that this resolution was a repudiation, admits the existence and validity of the previous contract.

A contract cannot be repudiated, unless it has been in existence.

(5.) As an unsuccessful attempt "to draw from the defendants a modification" of the contract of Jan. 31st, the communicated resolution did not affect that contract, or alter in the least degree its terms, or the rights or obligations of the parties thereunder. Such an attempt is not of a repudiatory character.

"A treaty and negotiation for a variation of an agree-
"ment will not amount to a waiver of it, unless the cir-
"cumstances show an intention of the party, that there
"should be an absolute abandonment and dissolution of
"the contract."

Murray *vs.* Harway, 56 N. Y., 347.
Schuchardt *vs.* Allens, 1 Wallace, 359.

Allcott *vs.* Boston Flour Mill Co., 9 Cush., 17.
Utley *vs.* Donaldson, 94 U. S., 29-47.
Holton *vs.* McPike, 27 Kan., 286.
Robinson *vs.* Page, 3 Russell, 114.

(6.) An act by one party to a contract, which is to be regarded as an act of repudiation, must be of a clear and positive character. It must carry with it the distinct idea, that the party will not perform the contract on his part.

It must be more than a dispute, as to the meaning of the written contract, or an effort to procure its modification.

It must be more than this communicated resolution.

It is only to be "proved by evidence that he had utterly renounced the contract."

Hochster *vs.* De La Tour, 2 E. and B., 689.
Smoot's Case, 15 Wall, 36.
Avery *vs.* Bowden, 5 E. and B., 714-718-9, 727-8.
Reid *vs.* Hoskins, 5 E. and B., 729, 744.
Barrick *vs.* Buba, 2 C. B., N S., 563.
Price *vs.* Dyer, 17 Vesey, 356.
Joyce *vs.* Swan, 17 C. B., N. S. 84.

And this intention to repudiate is a question of evidence and not of law.

Mersey Co. *vs.* Naylor, 9 L. R., Q. B. Div., 648.
Freeth *vs.* Burr, 9 L. R. C. P., 208.

(7.) But supposing the communicated resolution is to be regarded, as a repudiation of the contract of Jan. 31st by the plaintiff, the position which the defendants took and never abandoned, in their letter of Feb. 28, left the contract *alive* as to both parties, and wholly unchanged.

That position was: "we look, therefore, for the delivery of the rails within the dates named in the contract of your Co., and in gross, not net tons."

Record, page 22.

It is now well settled, that when one party to an executory contract, distinctly announces to the other that he will not perform on his part, the other party may do one of three things.

(1.) He may treat the notice as wholly inoperative, either saying nothing about it, or insisting upon performance.

(2.) He may, upon notice to the other party, join with him in throwing up the contract altogether.

(3.) He may treat such notice as a breach of the executory contract, and sue at once for damages, though the time for performance has not arrived.

But he cannot do all three, or any two of these things. He can adopt only *one* course. He has only *one* election, and by that he is bound. The right, to elect to treat such notice of intention of non-performance as a breach, or to join with the other party in treating the contract at an end, on both sides, is forever lost by the explicit demand for performance.

In the case at bar, if the communicated resolution was a repudiation, the defendants, nevertheless, at once demanded performance of the contract by the plaintiff, "within the dates named" therein.

"The defendants did not, by word or act, prior to June 10th, change their previous position in regard to the contract, which position is stated in their letter of Feb. 28.

Record, page 18.

As it requires the meeting of two minds to make a contract, it also requires the meeting of two minds, to *change* or *rescind* the contract.

Notice of an intention, by one party, not to perform the contract, before the time for performance has arrived or is past, is not of itself a repudiation or breach.

It remains only a matter of intention, and if the other party, has not treated it as a breach, more especially, if the

other party has insisted upon performance, the contract is alive as to both parties, because it has not been changed, and the party giving such notice has not only the right, but is bound, by the unchanged contract, to perform it on his own part, within the time fixed for the performance.

In such case, such notice of intention not to perform, has ceased to have any possible effect on the contract. A threat of non-performance by one party, followed by a positive demand of performance by the other, is exhausted. The other party, having demanded performance, cannot change *his* position, if he would; in this case he did not attempt to do so.

"A mere notice of an intended breach, is not of itself a "breach of the contract.

"It may become so, if accepted and acted on by the other "party.

"If the defendants had accepted the plaintiffs notice of "breach, contained in their letter of Nov. 19, and acted "upon it, there would plainly have been a breach of the "contract.

"The defendants however on Dec. 4, still insist upon com- "pliance. They say "they are now prepared to receive said "coke under the contract.

"*This certainly kept the contract alive as to both parties.*"

Zuck *vs.* McClure & Co., 98 Pa. St., 541-5.

"They could not take the chance of a rise in the market "price of petroleum, and *then* elect to rescind the contract "or not, as might be for their advantage."

Morgan *vs.* McKee, 77 Pa. St., 228–31.

"They could not both hold the defendant to the prospec- "tive performance of the contract and *at the same time*, say "that it was renounced."

Reid *vs.* Hoskins, 5 E. and B., 744, affirmed, 6 E. and B., 953.

Frost *vs.* Knight, 7 Ex., (L. R.,) 111.

Danube, &c., R. Co., *vs.* Xenos, 13 C. B., N. S., 825.

Danube, &c., R. Co., *vs.* Xenos, 11 C. B., N. S., 152.

Hochster *vs.* De La Tour, 2 E. and B., 678.

Brown *vs.* Muller, 7 Ex., (L. R.,) 319.

Avery *vs.* Bowden, 5 E. and B., 714.

Barrick *vs.* Buba, 2 C. B., N. S., 563.

Cort *vs.* Ambergate, &c., R. Co., 17 Ad. and El., N. S., 127.

Lawrence *vs.* Dale, 3 Johns Ch., 23.

Sampson, Guardian *vs.* Warner, 48 Vt., 247–58.

Phillpotts *vs.* Evans, 5 M. and W., 475.

477.

Leigh *vs.* Patterson, 8 Taunton, 540.

What is said in some of the cases, and text-books, about notice of an intention not to perform, if not retracted before performance is due, being evidence of a continued intention to refuse performance, down to the time appointed for performance, does not affect this case.

What is meant is, that the party so refusing and not retracting, cannot, when sued by the other party, for a breach of the contract, claim that certain matters should have been performed by such other party, which otherwise, he would have had to perform as conditions precedent.

Such continued refusal by the party sued, is a waiver of such performance.

Ad vana lex neminem cogit.

Such was one feature of the case of

Ripley *vs.* McClure, 4 Ex., 345.

It is also meant, that such continued refusal, down to, *if including* the time fixed for performance, gives the party so

refusing, no right to claim a breach of the same contract, by the other party.

But this comes about, not because of the previous refusal, but by the refusal to perform, *when and while and so long as performance is due.*

If refusal of this sort exists, it is not affected by a previous refusal.

If refusal of this sort, does *not* exist, and it did not in the case at bar, the previous refusal, is of itself inoperative, except as made so by the election of the other party.

SIXTH ERROR.

"That the omission of the plaintiff corporation to reply "to the defendants' letter of Feb. 28th, in connection with "the said vote and letter last mentioned, estops it, to deny "its attempt to repudiate the contract, evidenced by Ex- "hibits 1 and 2, and from a recovery in this action."

(1.) This position concedes, and the record finds that the plaintiff had *in fact*, no intent to repudiate the contract, but claims that the plaintiff is *estopped*, from showing what the *truth* was.

The defendants stand very *awkwardly* in this position, when the very letter referred to in this assignment is read.

"*We assume* that this resolution was passed merely as "*matter of form*, and a copy has been sent us, for our in- "formation solely, as no mention was made at the time of "the negotiations, that you *acted subject to any approval by* "*your Company*.

"We understood *then* and understand *now* that the sale "made at that time, on behalf of your Co., was an *absolute*, "*and final, unconditional sale*.

"We do not understand, further, that this *resolution was* "*forwarded to us, with the view of, in any way, modifying* "*that sale in any of its terms*.

"Furthermore, we understood at the time and now "understand, that the number of pounds in each ton of

"this contract, there being no contrary specification when "the contract was made, was not 2,000, but 2,240 lbs.. "Old rails, like other scrap and pig iron, are bought and "sold by the gross ton, not only in this market, but in "every foreign market.

"The custom of the trade fixing 2,240 as the standard "number of pounds in a ton of old rails, is universal and "can be excluded from operating on contracts, only by "distinct conditions, fixing some other quantity. No such "conditions were mentioned in the contract of your Com- "pany with us, and we *look*, therefore, *for the delivery of* "*the rails within the dates named* in the contract of your "Company, and in gross, not net tons. We *make no doubt* "but that *your* understanding of the contract is in accord "with *ours*, and that in so far as this resolution fixes a "different number of pounds for each ton, that it so fixes "them by an oversight on the part of the directors. We "hope to hear from you at your early convenience."*

From this letter, it clearly appears that the defendants, on Feb. 28, 1880, did not understand that the plaintiff intended to repudiate the contract, and that the defendants were looking for and expecting the delivery of the rails, within the dates named, in tons of 2,240 lbs.

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*This letter clearly shows that in the negotiations the parties talked of "tons" and nothing more. Wheeler, who drew Ex. 1, was ignorant of the Statute of his State concerning the weight of a "ton," vide question and answer No. 9, Record, page 18.

If the *defendants then* understood what the *truth* was, about the plaintiffs having no intention to repudiate the contract, how is the plaintiff now *estopped* from showing the *same* truth?

(2.) Estoppels are mutual, if they exist.

Will it be pretended that the defendants, if it was for their interest, could not show what the *truth* was, about the plaintiff's intention to repudiate.

(3.) Estoppel, in fact, has nothing to do with this question.

If the act done was a repudiation, it is immaterial what the intent was. If it was not a repudiation, the intention was alike immaterial.

If the act done was a repudiation, then its effect on the contract depended on the action of the defendants, with reference thereto.

If the act done, was not a repudiation of the contract, it of course had no effect on the contract.

(4.) But it is claimed, that the plaintiff was bound to answer the letter of Feb. 28.

(*a.*) The letter does not specifically call for an answer. It assumes that silence gives consent.

(*b.*) The letter does not intimate that the action of the defendants will be affected in any way, by such answer.

(*c.*) The only *demand* in the letter, was for performance "within the dates named."

A reply was only *hoped* for, at the plaintiff's *convenience.*

(*d.*) The not replying, in no way affected the defendant's demand for performance.

That continued to hold the iron in the plaintiff's hands, for the defendants.

If the defendants' demand for performance stopped, when, where, and how did it stop?

(*e.*) The defendants suffered no loss, by reason of a want of a reply.

The Court says: "Such pecuniary loss is not proved "here, for I do not regard Mr. Wheeler's answers to "questions 6 and 7, as proving any loss, to which he was "subjected by the silence of the plaintiff."

Record, Page 19.

(*f.*) The correspondence, including that of Feb. 28, had reached the point that *each party was regarding the contract of Jan.* 31 *as binding*, and had proceeded further, to a discussion of the true legal meaning of the word "ton," in that contract, and the defendants sharply demanded performance of the contract, by the delivery of the rails, and in gross tons, and the delivery of the rails, in gross tons, was tendered them.

What was the real need of further correspondence?

How has the not answering the letter of Feb. 28 wrought any change in the rights and obligations of the parties under the original contract?

(*g.*) The truth is, the defendants are confounding a question of *courtesy*, with a question of *right*.

In cases where one party to a contract has sought a modification of it, or has announced his intention not to perform it, and the other party has refused the modification, or treated the notice of intention not to perform as inoperative, and demanded performance "within the dates named," the latter party has no other *right* against the former, but to *require performance*.

Nothing having come out of the request for modification, or out of the notice of intention not to perform, the original contract, remains in all its force.

All that either party is *bound* to the other, is *to perform the contract.*

Neither is *bound* to write letters to the other. Neither is *bound* to answer the other's letters.

There is the "living" contract, to which both are bound, and by which *alone*, the obligation of the one to the other is measured.

"The learned Judge told the jury, that the plaintiff had "a *right*, before the arrival of the cargo, to a distinct answer "whether the defendant would fulfil the contract, or not," (the defendant having previously said he would not take the cargo.)

"As to the latter point, if *this had been laid down as a proposition of law, it certainly would not have been correct.*

"The defendant was not *bound to do any thing*, before the "arrival.

"But it was contended that this was only *an observation* "made by my Brother Coleridge, on the *facts*, and "amounted merely to this: that in the *intercourse* of *mer-* "*chants*, under the circumstances of the case, a letter from "the plaintiff to the defendant, containing a request for "such an answer, *ought* to have been answered. and we do "not think that my Brother Coleridge meant to say *more*, 'nor that the jury could have understood him so."

Ripley *vs.* McClure, 4 Ex., 345. Parke, B.
Brown *vs.* Muller, 7 Ex., (L. R.,) 319.

SEVENTH ERROR.

"That the writings, Exhibits 1 and 2, were not treated "by the plaintiff as evidencing any contract, until the vote "of the directors of the Company of Feb. 16, 1880, and by "that vote the plaintiff denied the existence of any con- "tract which evidenced an agreement, on its part, to "assume an obligation to deliver tons of rails, of 2,240 "pounds to the ton, and were thereafter estopped from "setting up, to their own gain, and to the defendants' loss, "any such asserted contract."

(1.) This assignment proceeds upon the hypothesis, that the "ton" of the written contract is legally 2,240 lbs. If such "ton" was, in law, 2,000 lbs., there is nothing to this or any other assignment.

(2.) This assignment shuts out of view, the action of the defendants, and their letter of Feb. 28.

Hamlet might as well be played, with Hamlet out.

(3.) "That the writings, Exhibits 1 and 2, were not treated by the plaintiff, as evidencing any contract, until the vote of the Directors of the Company, of Feb. 16, 1880."

These writings in *fact*, were a binding contract, from the time they were executed and *the defendants so understood.*

"No mention was made at the time of the negotiations, "that you acted subject to any approval by your company. "We understood *then* and understand now, that the sale "made at *that* time, on behalf of your Company, was an "absolute, and final, unconditional sale."

Record, Page 22.

(4.) "By that vote, the plaintiff denied the existence of "any contract, which evidenced an agreement on its part, "to assume an obligation to deliver tons of rails of 2,240 "lbs. to the ton."

This is not a true interpretation of that vote. This interpretation, does not correspond with the intent of the plaintiff as found by the Court, or with the understanding of the defendants, as expressed in their letter of Feb. 28.

By this vote, the directors confirmed what Murchie had done, though it needed no confirmation, and sought, by suggesting that the ton was 2,000 lbs., to procure the assent of the defendants to that suggestion.

The did not deny the agreement which Murchie had made on their behalf.

They did not deny their liability under it, to the full extent of its legal meaning, and this was the exact impression as to the plaintiff's position, the resolution produced on the defendants, as shown in their letter of Feb. 28.

(5.) "And were thereafter estopped from setting up any such asserted contract, to deliver tons of 2,240 lbs."

(*a.*) There was no "asserted" contract, as distinguished and separate from the contract of Jan. 31st.

The language of the performance was.

"We have now ready for delivery *the* 1,000 tons of old "rails sold you, Jan. 31, 1880, by *contract of sale of that date*, "*made by you and James Murchie*, as representing the New "Brunswick & Canada Railroad Co.

"In your letter to James Murchie, as vice-president of "our Company, of Feb. 28, last, you construe *the contract*, "as meaning that the ton of rails specified in *that contract* "is 2,240 lbs. or the gross ton. Now without waiving any "of our right under *that contract*, but to avoid dispute, we "tender you the delivery of *the* thousand tons, at gross "weight of 2,240 lbs. to the ton."

Record, Page 22.

(6.) Estopped from "asserting."

How did the plaintiff "assert"? After the letter of Feb. 28, the plaintiff did *nothing but tender the rails to the defendants.*

The defendants wrote, "we look for the delivery of the "rails, within the dates named in the contract of your Co., "and in gross, not net tons."

Could the plaintiff be estopped from complying with this demand?

The defendants wrote, "we make no doubt but that your understanding of that contract is in accord with ours."

Could the plaintiff be estopped from acting, as the defendants expected it would act?

If the contract of Jan 31st was in force, when the time for delivery came, could the plaintiff be estopped from discharging its duty, under it?

When, where and how, had the contract of Jan. 31st ever ceased to be binding upon the plaintiff from the time it was made?

When, where and how, had the plaintiff been at liberty to sell these rails, to any other person than the defendants?

When, where and how, had this contract ceased to bind the defendants?

It certainly held them, when they wrote the letter of Feb. 28.

That letter *by its terms*, made the contract binding on *them*, to "*within the dates named in the contract*," *i. e. until and through the period for delivery of the rails.*

(7.) "Estopped from asserting a contract to deliver tons of 2,240 lbs."

But the *defendants* "asserted" that such was the contract.

Estoppels are mutual.

Do the defendants desire a monopoly of such "assertions?"

Is the plaintiff to be estopped from assenting or agreeing to such "assertions?"

(8.) "Estopped from setting up, *to their own gain and the defendants' loss.*"

(*a.*) Here is the essence—the pith of this assignment—*the defendants' loss.*

Had iron rails continued to be of the same price on June 10 and Aug. 10, that they were Jan. 31 and Feb. 28, we should have heard no question made about the *right* of the plaintiff to tender tons of 2,240 lbs.

(*b.*) Iron rails fell in market price, to be sure, but *having held the plaintiff to the contract, while the fall took place, and far past the point of profit to the defendants, was it for the defendants, when the iron was tendered according to their demand, for the first time, to slip out from their loss, and throw upon the plaintiff the loss of the increased market value of the iron, at the time of the sale?*

(*c.*) "To their own gain and to the defendants' loss."

What have gain and loss got to do with the construction of a written contract?

We sold, in writing, so many tons of old rails, to the defendants, on future delivery.

We afterwards tried to get them to say that the "tons," in the writing, were 2,000 lbs. each. They refused to do so, and insisted that the "ton" was 2,240 lbs., and demanded such tons.

We, at the proper time for delivery, tendered such tons; wherein have we broken the contract?

True, at this time old rails had fallen very greatly in market value.

But it was to guard against this contingency of loss, that we sold when we did, and the defendants took the risk of that contingency of loss when they bought.

At the time of tender of delivery and refusal, there was no question of *gain, at all.*

It was all a matter of *loss* and *damages*, and the question was, *who* was to bear and suffer it?

(*d.*) The logic of the defendants leads to only one conclusion, *i. e.*, we would have the right to deliver tons of 2,240 lbs. *only, if at the time of the delivery, there would have been a profit, or no loss to the defendants, in taking them.*

If there had been a loss, there would have been no contract at all!

EIGHTH ERROR.

"That if the Exhibits 1 and 2 did at their date, evidence "a contract between the plaintiff and defendants, the sub- "sequant vote of Feb. 16, 1880, and the correspondence "and conduct of the plaintiff contemporaneous therewith, "and subsequent thereto, discharge the defendants from "any obligation to accept the iron, at the time it was ten- "dered to them, on the 14th of June, and the 10th of Aug., "1880."

(1.) This is substantially a combination of the 5th, 6th and 7th assignments of errors.

There is no conduct or correspondence of the plaintiff, bearing upon the issue, in any way favorably for the defendants, which has not been made the basis of an assignment of error in the three preceding assignments.

(2.) These assigned errors have no greater strength in combination than separately, and we beg leave to refer to the criticisms already made, and to claim that they satisfactorily answer the alleged errors, whether separately or in combination.

(3) This assignment of error, like its predecessors, *leaves out of view and consideration, the claims and conduct of the defendants with reference to the contract of Jan.* 31*st.*

The defendants now, apparently, do not like that letter of Feb. 28, though it is exceedingly well written,

(4.) But with reference to the conduct of the plaintiff, since entering into the contract with the defendants, one thing is very clear.

The plaintiff *held the rails, it sold to the defendants, for them.*

It made no attempt to re-sell the rails, although at the time of the alleged repudiation by it of the contract, it could have re-sold them, according to Mr. Wheeler, at a considerable advance.

Record, Page 18.

It held the rails for delivery to the defendants, and lost the difference between the then market value, and the value, at the time of the delivery, because it was bound to deliver the rails to the defendants.

The only conduct, on the part of the plaintiff, which the defendants were looking out for, or intending to rely upon, after their letter of Feb. 28, concerned whether the long or short ton would be delivered.

It was the only "conduct" on the part of the plaintiff, which the defendants had said, they cared to insist upon,

"We look for the delivery, within the dates named, in gross not net tons."

Had the defendants explicitly demanded *then*, to know what the plaintiff *then* expected to do "within the dates named," their position *now*, would not be so ridiculous.

But they made no such demand. They were confident—"made no doubt" of being right about their construction of the contract.

Now with just such "conduct" of the plaintiff, as they had demanded; made known, at the time, they had demanded, it should be made known, and with the demand, never withdrawn or modified, how can the defendants throw the loss, in the market value of these rails upon the plaintiff.

NINTH ERROR.

"That by reason of the circumstances, attending the "claimed inability of the defendants to sell said iron rails, "as detailed in the testimony of E. S. Wheeler, which is "set out in the finding, and the fall in the price of old iron "rails, after Jan. 31, 1880, the plaintiff is not entitled to re- "cover in this action."

(1.) What has been heretofore said about gain and loss under the argument concerning the seventh error, is applicable here.

(2.) "*Claimed* inability!" It is not suggested that such inability was *proved*, and the record is clear, that it was not proved.

"The remaining questions and answers were considered "to be properly in evidence, for the purpose of enabling "the Court to ascertain the effect of the silence of the "plaintiff, after the letter of Feb. 28th, upon the defendants' "previous position, in regard to the contract—the previous "position having been that of affirmance."

Record, Page 17.

"Such pecuniary loss is not proved here, for I do not "regard Mr. Wheeler's answers to questions 6 and 7, as "proving any loss, to which he was subjected by the silence "of the plaintiff."

Record, Page 19.

(3.) An examination of Mr. Wheeler's testimony shows that this "claimed," but unproved inability to sell the rails did not occur through any act of the plaintiff.

This inability, as stated by Mr. Wheeler, was, at first, because the circumstances made it "prudent for us to in- "vestigate the character and responsibility of the sellers. "That investigation we could not make without some de- "lay."

Record, Page 18.

When, if ever, that investigation was commenced or completed, is not stated. What was the reason, why, after receipt of the letter of Feb. 17, Mr. Wheeler did not try to re-sell the old rails is not shown; but this witness was ready to state the operations of his own mind in other circumstances, and by agreement, the door was wide open for this kind of testimony.

The failure to try to re-sell the rails, after the letter of Feb. 17, is not by Mr. Wheeler, ascribed to that letter, and he certainly would have so testified, if such were the fact.

We may not conjecture, what this witness thought, except as he testified, and wrote in the letter of Feb. 28.

(4.) As argued in another place, it is not pretended that Mr. Wheeler stated to Mr. Murchie, that his purpose in buying the rails, was to re-sell.

Nor was there anything in the subsequent conduct of the defendants, which indicated to the plaintiff, that they wished to know what the plaintiff would do, in order to govern their supposed or proposed action, in re-selling the iron.

(5.) Where parties differ as to the construction of a written contract, or one seeks a modification of it, or renounces it, the other party, while insisting upon the performance of the contract, cannot object to the collateral consequences, arising from the uncertainties attending the contract.

A party may not insist upon performance by the other party, of a contract, and, at the same time, object to its being operative upon himself.

In the case at bar, the defendants upon the receipt of the letter of Feb. 17, had the right to take such position as they believed, or were advised, was their legal right, and according to their interest.

We know that a letter from St. Stephen, Feb. 17, did not take 11 days to reach New Haven.

The defendants took ample time, before replying, and deliberately chose their position of Feb. 28.

Having taken the position of requiring the performance of the contract "within the dates named," they had no legal right to receive from the plaintiff, before the "dates named," a treatise on the law of the construction of written contracts, or on the statutory vs. commercial ton, or any statement whether it would deliver gross or net tons, especially if they did not specifically ask for such treatise or statement, and as they were satisfied the gross ton would be delivered, as in fact it was tendered.

What might be to them the direct or collateral consequences of insisting upon the performance of the contract, (if cause had been given them to declare it off) was for them to decide, and with them they remain.

They cannot shift them upon the plaintiff.

TENTH ERROR.

"That if the plaintiff is entitled to judgment, for dam-
"ages, by reason of the refusal of the defendants to accept
"the tender made on the 10th of Aug, 1880, of the 600
"tons named in Exhibits 1 and 2, it is not entitled to dam-
"ages beyond those sustained by reason of the defendants'
"refusal to accept 200 of said 600 tons."

I.

Obviously there is presented by this assignment, a claim for reversal of the judgment only in part.

The way in which the judgment is made up, is stated in the Record.

The total judgment for damages is, . .	$18,264.80
The principal of the damages on the first count was ($11 per ton,)	$11,000.00
Interest from Aug. 1st, 1880, the end of the first period for delivery, to July 12, 1882, the date of the judgment, ...	1,287.00
Total, . .	$12,287.00

The principal of the damages on the second count was ($9 per ton,)	$5,400.00
Interest from Oct. 1st, 1880, the end of the second period for delivery, to July 12, 1882, the date of the judgment, ...	577.80
Total, . .	$5,977.80
Add total first count, . . .	12,287.00
	$18,264.80

The defendants claim, under this error, that the damages under the second count, $5,977.80, should have been one-third of that sum, *i. e*, $1,992.60.

Rev. Stat. U. S., Sect. 701.

II.

We say that the ruling of the Court was right, for the following reasons, either one of which is decisive.

(1.) The contract was absolute and entire, for the sale and delivery, on the one hand, and the purchase and acceptance, on the other, of all the old rails the plaintiffs had to sell, not exceeding 1,600 tons. The expression, "two to six hundred tons," was only a "conjectural esti-

mate" of the quantity left after the first delivery of 1,000 tons.

The finding of facts discloses, that the transaction was an immediate sale and purchase of whatever old rails, then on the plaintiff's road bed, would be displaced by the steel rails, and could be delivered by Oct. 1st, next, not exceeding 1,600 tons, nor less than 1,200 tons, and that there was nothing understood by the parties, as optional about the contract; the absolute promise of the plaintiff to deliver absolutely 1,200 tons, being the consideration for the absolute promise of the defendants to take whatever, within the contract limits, should be delivered.

(*a.*) It is elementary law, that in the construction of a written contract, resort may always be had to the surrounding circumstances, in order to arrive at the intention of the parties.

We may always read the writing, in the light of the facts, out of which it came.

(*b.*) The finding shows, what the surrounding circumstances were.

The plaintiff was buying 2,000 tons of steel rails, to replace iron rails then in use.

There would be about 1,500 tons of old rails displaced, and it might well be presumed that some old rails were on hand, after laying down the previous 1,000 tons of steel rails.

It was calculated, that the plaintiff had 1,600 tons of old rails for sale.

The old rails would be ready for delivery, as fast as the steel rails should be laid, but they would not all be ready at the same time.

The plaintiff was a *Railroad Company*, not a dealer or speculator in old iron.

It wished *then* to sell *all* the old rails it had, which were or would be displaced by the proposed laying of steel rails.

These old rails, then owned by the Co., and on its rail-bed, were the subject matter of the sale; 1,000 tons could be delivered in any event, before Aug. 1st and at least 200 tons of the balance, and perhaps all, between August 1st and October 1st.

The position of the defendants at the time of making the contract is also clear.

Mr. Wheeler knew that the plaintiff, through Murchie, was selling these old rails "*at much less than the market price of the day.*"

Record, Page 18.

The *more* old iron rails, that the defendants could get under such circumstances, the better *they* would be satisfied.

(*c.*) The delivery is to be of a certain quantity before Aug. 1st, and the balance *between* Aug. 1st and October 1st; giving the idea of a *continuous* delivery of *all* the old rails the plaintiff sold.

(*d.*) The language of the Exhibits 1 and 2, is in harmony with the surrounding facts, and clearly shows the intention of the parties.

The transaction is described in the written contract, as *completed*, so far as the *bargain and sale*, are concerned.

"*We have bought of you*," 1,200 to 1,600 tons.

"Your *order is accepted*."

The bargain and sale are closed, and nothing executory is left, but delivery and payment.

There is to be no *future* buying; no future *negotiations* concerning buying.

Now this language clearly shows that the parties had in mind, as the subject of sale, an actually existing quantity of old rails, the entire weight of which was unknown, except that it was not less than 1,200 nor more than 1,600 tons.

The phrase "*to six hundred*," cannot be struck out of the contract.

The defendants put it there.

We must all admit that it had a meaning, and expressed an intent of the parties.

That phrase shows, that when the contract was executed, one party had bought, and the other party had sold, not 1,200 tons of old rails, but from 1,200 *to* 1,600 tons; all the old rails the plaintiff would have on hand, within the dates named, from the proposed re-laying steel rails, not exceeding 1,600 tons.

It was not an uncertain quantity, in the legal sense of "certainty."

Id certum est, quod reddi certum potest.

It was just as certain, as the parties, in their agreement could or did make it.

Each was then bound to the other; the plaintiff to deliver from 1,200 to 1,600 tons of old rails, if so many were released from the road bed, and the defendant to receive and pay for the same.

The plaintiff was not at liberty to dispose of the rails from 1,200 to 1,600 tons, to any other party.

The rails represented by the tons between 1,200 to 1,600 tons were *sold* to the defendants.

Any other construction of the contract, rejects the phrase "*to six hundred,*" as meaningless, while admitting that

the phrase did express an intent, to which each party was committed.

Giving to each word of the contract, its meaning, which, on the face of the writings, and, in the light of surrounding circumstances, it is shown to have had, we find no meaning, which is antagonized by the words of the writing.

We find a writing closely and compactly drawn, with elliptical phrases, which suppose, that the reader is acquainted with the surrounding facts, and we find it was a contract, by which the plaintiff then sold to the defendants, and the defendants then bought of the plaintiff, of the old rails, the plaintiff then had, so many as would be released from use on the road-bed, by the laying of steel rails, in time for delivery by October 1st, next, as should at least equal 1,200 tons, and not exceed 1,600 tons, and to this each party was then bound, and from and after that time, the old rails as taken up, to the limit of 1,600 tons, the plaintiff was bound to deliver to the defendants, and the defendants were bound to receive the same.

Parker *vs.* Pettit, 43 N. J., L. 512.

(*e.*) Such was the practical interpretation put upon this contract.

The plaintiff held and had 600 tons of old rails for delivery to the defendants.

They tendered them the 600 tons.

The defendants did not then object, that at the most, there could be an obligation on their part, to take only 200 tons.

They took it for granted, that if the plaintiff had the 600 tons, it would tender the delivery of that amount, and they did not intimate that its action was wrong in this respect.

(2.) That if there was anything optional about the contract, the option was clearly with the plaintiff, as the first party to act,—the delivery of the bought rails being the first executory act.

In contracts of an admitted optional character, it is the common law, that the party, who is the first to do anything under such contract, determines the option—determines how much of the thing shall be done—or what shall be done.

Price *vs.* Dyer, 17 Vesey, 363.
Dann *vs.* Spurrier, 3 Bos. & Pull, 399.
McNitt *vs.* Clark, 7 John, 465 and Note.

In Small *vs.* Quincy 4 Greenl., 497, the contract was similar to that in hand and the Court say:

"The case presents us the evidence of the written promise of each party to the other; both promises having been made at the same time and constituting one contract, and it seems to be an intelligible one and easily understood. By its terms the plaintiffs were bound to deliver to the defendants at Philadelphia at least 1,000 bushels of potatoes at the agreed price; but they were not bound to deliver more than 3,000 bushels; and the defendants on their part were not bound to accept and receive less than 1,000 bushels; nor more than 3,000.

These were the respective rights of the parties according to the written contract. The plaintiffs were to do the first act by delivering or tendering the potatoes at the place appointed, and our opinion is that they were not obliged to determine, as to the quantity they intended to deliver, until the arrival of the vessel at Philadelphia. They reserved to themselves an option, as to the quantity, within the stipulated limits."

And to same effect is Disborough *vs.* Nelson, 3 Johns, Cas. 81, where it is said:

"By the especial agreement in this case the defendants were bound to receive the whole 1,000 barrels of meal if tendered within the time specified. It was at the option of

the plaintiffs only to deliver any quantity from 700 to 1,000 barrels, and the stipulation in that respect was for their benefit. It does not follow that the contract was not mutual. There was a sufficient consideration on both sides, and a contract may be optional with one of the parties, in part or in whole and obligatory on the other."

In the present contract, the number of tons to be delivered, is necessarily with the plaintiff.

The contract does not hint the idea that the defendants were to announce to the plaintiff, how many tons, above 1,200, the defendants would take, as a condition precedent, to the plaintiff's delivery of more than that amount.

There was no such idea.

The plaintiff, as the *first* party to perform, would commence and continue to make delivery, until all the sold rails had been delivered.

It cannot be supposed to have been the intention of the parties, that the plaintiff should have sent on to the defendants after August 1st for delivery, a cargo of old rails, which might well have been of 300 or 400 tons, or more, and that the defendants had the right after the arrival of the cargo, to accept only 200 tons.

So the defendants write:

"We look for the delivery of the rails, within the dates named" *i. e.* we have nothing previous, to say to you.

You deliver the rails, we have bought, and we take and pay for them.

Clearly both parties were not understood to have *equal* power, to determine, whether more than 1,200 tons, and if so, how much more should be delivered.

That would be but saying, that when the 1,200 tons had been delivered, the plaintiff would deliver more of the sold rails, if it chose, and if the defendants would take more, at $28 per ton, which would be utterly meaningless in any point of view.

It would be a natural presumption that the *plaintiff* would be the person relied upon, to know how many of the sold rails, *could be delivered before Oct. 1st*, and its obligagation was to deliver all it could, within the dates and limits named.

On the other hand, if the delivery of more than 1,200 tons, depended as a condition precedent, upon the election of the defendants, if there would be no profit to them, no more would be taken, and whatever the plaintiff had on hand, which it had held for the defendants, would remain on their hands, and it would lose severely, by having held them for the defendants.

If there would be a profit, to the defendants, in taking

more than the 1,200 tons, then the whole 400 tons would be ordered, and the plaintiff would be bound to deliver or pay damages, whether it had the rails ready for delivery or not.

In other words, the election of the defendants, as a condition precedent, would be governed entirely by the *future* market price of the iron, at the time of the delivery, whereas it is clear, that in this contract, the parties intended that the *future* price of the iron, should not affect the action of the parties, or the construction of the contract.

Each party took the chances on such *future* market price, and *fixed a price*, which should be paid for *all* the rails to be delivered, from two hundred to six hundred tons *i. e.* $28 per ton.

It is of the very nature of contracts like this, that the parties intend to be bound by *the fixed contract price*, and that their action and the construction of their contract, is not to be affected by the *future uncertain* market price.

We are clear therefore, that it was understood, that the quantity of rails to be delivered, was to be determined by the plaintiff, and measured, by what it could deliver.

Where an alternative mode of performance reserved and the election is not given to the promisee, it ordinarily rests with the promisor.

2 Wharton Cont., § 620.

(3.) But even if this contract (assuming it to be an optional contract) could be so construed as to give the option as to the delivery of the 400 tons to the buyer, the defendants case would not be helped. For the defendants failed to exercise the option, and by their refusal to recognize the contract as in force, waived what ever right they may have had to its exercise.

And the rule is, that on the failure of the party, who has the right to make the election, at proper time, the right passes to the opposite party.

Townsend *vs.* Wells, 3 Day, 327.
Patchin *vs.* Swift, 21 Vt., 292.
Peck *vs.* Hubbard, 11 Vt., 612.
1 Pothier Obl., 247.
Viner Abr., *Election*, (B. C.)
Bac. Abr., *Election*, B.

The declaration of the defendants that there had never been any contract, did not change or alter or affect the contract, or the rights of the plaintiff under it. Such declaration was a mere nullity.

We conclude that the judgment of the Circuit Court should be affirmed with interest and costs in this Court.

C. P. Ingersoll
Julian Willing
Of Counsel

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884. No. 279.

E. S. WHEELER & CO.,
Plaintiffs in Error,
vs.
THE NEW BRUNSWICK AND CANADA RAILROAD CO.

Supplemental Brief (in reply) of Defendant in Error.

The brief filed by plaintiffs in error narrows to a small compass the field of controversy opened by the assignments of error.

It virtually concedes (as we have contended the answer virtually conceded) that on the 31st of January, 1880, the parties to this action entered into the contract set forth in the complaint—that their minds *then* met, without any misunderstanding,—and that by force of the contract so concluded, the plaintiffs in error became bound to accept the iron rails that should be thereafter delivered to them by the Railway Company, (defendant in error,) in accordance with the terms of the writings evidencing the contract.

With this concession a single question remains open. No ingenuity of phraseology can raise any other. Did that contract cease to exist before the tender of delivery which the plaintiff in error refused?

1. The plaintiffs in error say now, as they originally said in their answer, that this contract thus concluded on the 31st of January, 1880, did cease to exist by the abandonment or "repudiation" of its obligations by the Railway Company on the 16th of February, 1880.

But they fail to tell us now, as they failed to tell us in the answer, how such claimed abandonment or repudiation by the Railway Company could terminate the contract.

We will add nothing to what has been said, in our principal brief, as to the impossibility of imputing to the Railway Company, by this record, an intention to repudiate the contract. But, assuming for whatever it did, all the significance claimed by the plaintiffs in error, we desire to call attention to this failure of the plaintiffs in error to explain how one party to a contract can destroy it by a "repudiation" of its obligations without the concurrence in such "repudiation" of the other party;—and this, however willful and positive and well-intentioned or ill-intentioned the repudiation of the first party may be.

Is not the *aggregatio mentium* as necessary for the unmaking of a contract as for its making? And when and

where and how have the plaintiffs in error agreed to unmake this contract?

If the Railway Company really gave the plaintiffs in error to understand that it repudiated the contract, an election was, doubtless, presented to the plaintiffs in error, either to terminate the contract or to keep it alive.

But an election must be made promptly and when once made is made forever. *Pence* vs. *Langdon*, 99 U. S, 582.

And if the plaintiffs in error did understand, (as they now, in repudiation of the assertions of their letter of February 28, 1880, insist that they did understand), that the action of the Railroad Company was an abandonment of the contract, their election must be held to have been made by that letter and, henceforth, neither party could be at any time, heard to say that the contract was not in full and unimpaired life and force.

2 But, as if to avoid the difficulty just pointed out, the plaintiffs in error now labor with the contention that the Railway Company is somehow "estopped" by its action of February 16, from now setting up against the plaintiff in error, the contract of Jan. 31; although such contract was, in fact, fairly made and has never been rescinded.

But this is only another way of stating the same defence just noticed.

The *truth* which, it is claimed, we are "estopped" from asserting is that a contract was actually made on the 31st

of January, 1880. And the reason for the claimed estoppel is that we, on the 16th of February, 1880, denied that we had made any such contract.

This is, simply, saying over again that we repudiated the contract on the 16th of February and, therefore, cannot, thereafter, be heard to claim under it.

And the answer to this contention is precisely that already given. The contract cannot be annulled in that way, whether that way is called "estoppel" or "repudiation."

When both parties deny the contract they may both be "estopped" from re-asserting it—but it is their agreement that estops them. And until both parties do deny it, the contract estops them both from repudiating its obligations.

The authorities cited by plaintiffs in error show the difficulties of their position. They show that the requisites of an equitable estoppel are 1. That the party against whom the estoppel is claimed must have *intended* his statement to be acted on by the other party, as that party understood it, and 2. That the other party was, thereby, *misled* to his injury.

The estoppel claimed by the plaintiffs in error is without either of these requisites.

The plaintiffs in error, to make their estoppel operative, must say that they understood the Railway Company to intend a repudiation or disavowal of the contract. But the "special verdict" finds that the Railway Company had no such intention or desire, (p. 18, fol. 51)

And so the "special verdict" finds that the plaintiffs in error, were not *misled* by anything said or done by the Railway Company. "The defendants did not, by word or act, prior to June 10, change their previous position in regard to the contract, which position is stated in their letter of Feb. 28," (p. 18, fol 51.)

3. The brief of plaintiffs in error, (p. 18,) contains a diagram showing the fluctuations of the iron market during the period of this contract.

What this has to do with the contract rights of these parties—any more than a copy of the Weather Bureau Chart during the same period—we are at a loss to discover.

But it suggests a test for the contention of the plaintiffs in error, which will, we think, very plainly expose their real position.

Suppose the iron market (for which the New Brunswick and Canada Railway Company has as much responsibility as it has for the rise and fall of the barometer) had risen instead of fallen?

Would the plaintiffs in error, in such case, have been "estopped," by either the Railway Company or themselves, from requiring of the Railway Comyany a performance of this contract according to its terms?

Would the Railway Company have been heard for one moment to say that, in spite of its intention, its vote of Feb.